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No. 04-

IN THE

# Supreme Court of the United States

JOHN J. FELLERS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This Court previously held that police officers violated petitioner's Sixth Amendment right to counsel when the officers deliberately elicited an incriminating statement from petitioner, who at the time was under indictment and was entitled to the assistance of counsel in his defense. *See Fellers* v. *United States*, 540 U.S. 519, 524-525 (2004). Within only one half-hour of the Sixth Amendment violation identified by this Court, the same officers took petitioner to jail, administered *Miranda* warnings, and again confronted petitioner outside the presence of counsel, obtaining a related incriminating statement. The court of appeals ruled that petitioners' second statement was properly admitted at trial under the rationale of *Oregon* v. *Elstad*, 470 U.S. 298 (1985), without regard to whether the second statement was derived from the prior Sixth Amendment violation.

The questions presented are:

1. Whether the court of appeals erred in declining to analyze the admissibility of the second incriminating statement under the traditional derivative-evidence rule and instead holding that the statement was properly admitted at petitioner's trial under the rationale of *Oregon* v. *Elstad*, 470 U.S. 298 (1985). (This Court previously granted certiorari to decide this question, but did not resolve it.)

2. Whether the court of appeals erred in holding, in the alternative, that the admission of the second incriminating statement was harmless error, based on the sufficiency of other evidence purportedly supporting petitioner's conviction.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner John J. Fellers respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 397 F.3d 1090. The opinion of this Court (App. 17a-22a) is reported at 540 U.S. 519. The first opinion of the court of appeals (App. 23a-30a), which was reversed and remanded by this Court, is reported at 285 F.3d 721. The order of the district court (App. 31a-36a), the order of the magistrate judge (App. 37a-38a), and the transcript of the oral ruling of the magistrate judge on petitioner's motion to suppress (App. 39a-43a) are not reported.

## JURISDICTION

The opinion of the court of appeals was issued on February 15, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

## STATEMENT OF THE CASE

This Court previously granted a petition for certiorari in this case to decide two questions: (1) whether police officers violated petitioner's Sixth Amendment right to the assistance of counsel by deliberately eliciting a post-indictment, incriminating statement from him in the absence of counsel, and (2) if so, whether a second, related statement elicited from petitioner approximately one half-hour later, without any intervening consultation with counsel, but after the administration of warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), should have been suppressed as the fruit of the earlier Sixth Amendment violation. After briefing and oral argument on both questions, this Court unanimously agreed with petitioner on the first question, but remanded the case for the court of appeals to decide "in the first instance" whether petitioner's second statement was properly admitted under the rationale of *Oregon* v. *Elstad*, 470 U.S. 298 (1985). *Elstad*, which involved statements taken from a suspect who was not under indictment and was therefore not covered by the Sixth Amendment's Counsel Clause, held that the failure to give *Miranda* warnings to a suspect, when not amounting to a violation of the Constitution itself, does not require the suppression of a statement obtained after a subsequent provision of full *Miranda* warnings and the suspect's knowing and voluntary waiver of his *Miranda* rights. *See id.* at 303-309.

The court of appeals has now decided the question that this Court requested it to consider, reaching the same result that it reached prior to this Court's certiorari grant. As it

had previously, the court of appeals held that the admissibility of petitioner's second statement should be analyzed under *Elstad* rather than under the derivative-evidence rule (*i.e.*, the fruits of the poisonous tree doctrine) normally applicable in cases of constitutional violations. With the court of appeals' ruling, the question whether a confession derived from a Sixth Amendment violation can nonetheless be admitted under *Elstad* is now squarely presented for this Court's consideration. On remand, the court of appeals also applied a harmless-error standard that is flatly inconsistent with this Court's precedents. Petitioner respectfully seeks this Court's review on both issues.

1. On February 23, 2000, a federal grand jury returned an indictment charging petitioner with conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 846. One day later, Deputy Sheriff Jeff Bliemeister of the Lancaster County Sheriff's Office and Detective Sergeant Michael Garnett of the Lincoln Police Department went to petitioner's home in Lincoln, Nebraska to arrest him. App. 17a-18a. While in petitioner's home, the police officers deliberately elicited incriminating information from petitioner, "inform[ing] him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators"—Kathi Kuenning, Patrick Sardeson, Thomas Geffs, and Mark Farfalla. App. 21a. Petitioner agreed to talk to the officers and acknowledged that he had used methamphetamine at an earlier time in his life, when he had associated with the four named persons. App. 18a.

The officers then transported petitioner directly to the Lancaster County jail, a trip that lasted approximately twenty minutes, and placed petitioner in an interrogation room. *See* Joint Appendix, *Fellers* v. *United States*, No. 02-6320 (*Fellers* JA), at 21, 23-24, 49-50 (transcript of suppression hearing). After receiving *Miranda* warnings, petitioner agreed to speak to the officers. *Id.* at 24-27. Bliemeister then questioned petitioner about the same four associates

discussed during the immediately preceding encounter at petitioner's home. *Id.* at 29-34, 51-52, 89. Bliemeister acknowledged that in conducting the jailhouse interrogation, he employed specific techniques for which he had received training. In particular, Bliemeister attempted to elicit certain admissions from petitioner and then progressively sought increasingly more detailed answers about those admissions. *See* Trial Transcript (TT) 91-92, 177.

Armed with petitioner's prior acknowledgement that he had associated with the four individuals, Bliemeister initially questioned petitioner about "his involvement with ... Geffs." *Fellers* JA at 29. Having already admitted, in the previous encounter at his home, that he had associated with Geffs, petitioner again acknowledged the same. *Id.* In response to additional questioning by Bliemeister, however, petitioner denied that he ever had obtained methamphetamine from Geffs. *Id.* Bliemeister then moved his questioning to Sardeson, Kuenning, and Farfalla, similarly addressing petitioner's relationship with each person one at a time. *Id.* at 29-34. In each case, the officer asked petitioner whether he knew the person in question, even though petitioner had admitted his association with them just one half-hour earlier. *Id.* at 29-34, 51-52, 89. As this Court recognized, "petitioner then reiterated the inculpatory statements he had made earlier," acknowledging his association with each co-conspirator. App. 18a.

After reestablishing the fact of petitioner's association with Sardeson, Kuenning and Farfalla, Bliemeister asked additional questions seeking details of petitioner's relationship with each. In response to that interrogation, petitioner confessed that he had obtained methamphetamine from Kuenning and Sardeson, lent money to Kuenning, shared methamphetamine with Sardeson, and used methamphetamine with Farfalla. *Fellers* JA at 29-34, 37. Petitioner denied, however, selling methamphetamine. *Id.* at 37-38. Bliemeister also asked petitioner about his involvement with a few persons not broached previously at petitioner's home. *Id.* at 34-35, 37-38, 52. Finally, Detective Garnett asked pe-

titioner questions about his methamphetamine use. *Id.* at 35-36, 79. Petitioner repeated his earlier admission, made during the encounter at his home, that he had used methamphetamine. In response to further questioning, petitioner also discussed various details of that use. *Id.* at 33, 35-36.

2. a. Before trial, petitioner moved to suppress the statements he had made at his home and the jail. The magistrate judge held a hearing at which Bliemeister and Garnett testified. Based on the testimony, the magistrate judge found that the officers' statements to petitioner at his home were "designed to elicit a response," that only one half-hour elapsed between the time the officers left petitioner's home and the time they commenced interrogation at the jailhouse, and that, notwithstanding the administration of *Miranda* warnings at the jail, petitioner's jailhouse statement was tainted by the prior unlawful encounter at his home. App. 39a-42a. The magistrate judge recommended suppression of petitioner's statement at his home as well as his subsequent jailhouse statement to the extent that the latter concerned the persons discussed previously at petitioner's home (namely, Kuenning, Sardeson, Geffs, and Farfalla). App. 42a-43a.

The district court accepted the recommendation to suppress petitioner's statement at his home, but rejected the recommendation to suppress petitioner's jailhouse statement. App. 32a, 35a. According to the district court, petitioner "made a knowing, intelligent, and voluntary waiver of his *Miranda* rights" before making his jailhouse statement. App. 35a. Based on that fact, but without making any additional findings regarding the extent of any attenuation of the taint from petitioner's first statement, the district court found the jailhouse statement admissible under *Elstad*. App. 33a-35a.

b. Bliemeister testified at petitioner's trial, recounting petitioner's jailhouse statement for the jury. *See* TT 52-182. Apart from the officer's testimony, the government's case consisted entirely of testimony from witnesses with severe credibility problems. Each of the witnesses was involved in

some manner in the alleged conspiracy, and each also had numerous prior felony convictions (in addition to their recent convictions arising out of this alleged conspiracy). *See* TT 259 (Kuenning: three other prior convictions); 336 (Geffs: six); 394-396 (Sardeson: three); 430-431 (Abbott: five); 470 (Messersmith: two); 486 (Lawrence: two); 523-524 (Cotton: eight). Three of the government's witnesses, including its two primary witnesses (Kuenning and Cotton), had been convicted of forgery and other crimes that involved dishonesty and therefore cast doubt on their veracity. *See* TT 189 (Kuenning: forgery); 430, 437-438 (Abbott: forgery, two for false reporting to police officers); 523-524 (Cotton: theft by deception, three for forgery). All of the witnesses testified that they were long-time drug addicts. *See* TT 263-264, 344, 367-368, 441, 475, 512, 647-649. One of the government's two primary witnesses, Kuenning, testified that the government's other primary witness, Cotton, had a reputation for being dishonest and a liar. *See* TT 672. Kuenning also disputed the truth of important parts of Cotton's testimony, leading the government to take the unusual step of impeaching Kuenning, on whom its case was built, with her admission that, due to drug addiction, her "memory is worthless." TT 271, 681.

Moreover, all of the witnesses admitted that they were testifying pursuant to cooperative plea agreements. *See* TT 184, 261-262 (Kuenning); 303 (Geffs); 362 (Sardeson); 409 (Abbott); 446 (Messersmith); 484 (Lawrence); 519 (Cotton). At the time of their testimony, six of the seven witnesses were serving prison sentences for their recent controlled-substances convictions (*see* TT 183, 362, 409, 446, 484, 519), and the seventh witness (Geffs) avoided prison by entering into his plea agreement and cooperating with the government. *See* TT 303-307, 345-347. Kuenning, Sardeson, Abbott, Messersmith, and Cotton admitted that they were testifying against petitioner with the hope that, pursuant to their plea agreements, they would be rewarded with reduced sentences. *See* TT 186, 261-262, 365, 402, 434-435, 449-450, 473-474, 521, 594-595. Lawrence testified that he was

cooperating to avoid prosecution in federal court for offenses with longer prison sentences. *See* TT 511.

As a result, and in response to petitioner's repeated challenges to the credibility of the government's witnesses in cross-examination and closing argument, the government placed important reliance on petitioner's jailhouse statement. In its closing argument, after conceding its witnesses' shortcomings (*see* TT 728-729), the government attempted to shore up the testimony of its witnesses by describing several ways in which "[petitioner's] own statements corroborate the testimony that has been presented by the other witnesses who have been brought in for you." TT 734; *see also* TT 704, 732-734. The jury found petitioner guilty of a lesser-included offense involving between 50 and 500 grams of methamphetamine, thereby rejecting the charge of distributing more than 500 grams, for which the government had sought conviction. *See* TT 710, 739.

c. The court of appeals affirmed. The court rejected petitioner's Sixth Amendment challenge in a single sentence, holding that "the officers did not interrogate Fellers at his home." App. 26a. The court further held that because petitioner made his jailhouse statement after having received *Miranda* warnings, that statement was admissible under *Elstad*. App. 25a-26a. Judge Riley concurred. Although he believed the officers did violate petitioner's Sixth Amendment right to the assistance of counsel, he agreed that the jailhouse statement was admissible under the rationale of *Elstad*. App. 30a.

d. Petitioner sought review in this Court, arguing that (1) the court of appeals had applied an incorrect legal standard to the question whether his first statement was obtained in violation of the Sixth Amendment, and (2) if his first statement was obtained in violation of the Sixth Amendment, then his second statement also should have been suppressed as it was derived from the initial constitutional violation, and that *Elstad* does not permit the admission of a statement that is derived from a violation of the Sixth Amendment. *See* Pet. for Writ of Certiorari, *Fellers* v.

*United States*, No. 02-6320. This Court granted review on both questions. *See* 538 U.S. 905 (2003).

This Court reversed and remanded. Finding that the police officers " 'deliberately elicited' information from petitioner" after his indictment and in the absence of counsel, this Court ruled that "the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)], and its progeny." App. 21a. The Court further held that, given this error, the court of appeals "improperly conducted its 'fruits' analysis under the Fifth Amendment." *Id.* The Court did not resolve the second question on which it had granted certiorari concerning the admissibility of petitioner's second, jailhouse statement. Rather, this Court remanded the case for the court of appeals to decide "in the first instance" "whether the *Elstad* rationale applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." App. 21a-22a.

3. On remand, the court of appeals again affirmed petitioner's conviction. Addressing the precise question remanded to it by this Court, the court of appeals held that *Elstad* does apply in cases involving Sixth Amendment violations. *See* App. 8a ("[T]he *Elstad* rule applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel, notwithstanding earlier police questioning in violation of the Sixth Amendment."); *see generally* App. 3a-10a.

In so holding, the court of appeals rejected petitioner's arguments that *Elstad* is inapplicable to cases in which (1) an actual constitutional violation, rather than a mere *Miranda* violation, is at issue, and (2) a Sixth Amendment, rather than a Fifth Amendment, issue is presented. Respecting the first argument, the court of appeals recognized that this Court has held that the traditional derivative-evidence rule applies when government officers violate the Fourth, Fifth, or Sixth Amendment. *See* App. 4a. Indeed,

the court noted that *Elstad* itself states that "constitutional violations mandate application of the fruits doctrine." *Id.* The court of appeals also acknowledged that *Elstad*'s "rejection of the [derivative-evidence] rule in the *Miranda* context was premised on the fact that a violation of *Miranda* was not, by itself, a violation of the Fifth Amendment and on the fact that the protections afforded by the *Miranda* rule sweep more broadly than the Fifth Amendment itself." *Id.*

Nevertheless, the court of appeals ruled that the traditional derivative-evidence rule should not be applied in this case. The court of appeals determined that this Court undercut the original rationale for its *Elstad* ruling when it subsequently decided *Dickerson* v. *United States*, 530 U.S. 428 (2000). In the court of appeals' view, *Dickerson* reinterpreted *Elstad* as resting not on the absence of a constitutional violation but instead "on the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." App. 4a.

The court of appeals also rejected any distinction between the Fifth Amendment context of *Elstad* and the Sixth Amendment context of petitioner's case. Relying on *Patterson* v. *Illinois*, 487 U.S. 285 (1988), a case that did not address any derivative-evidence issues, the court concluded that the applications of the Fifth and Sixth Amendments to pretrial interrogation are sufficiently similar to justify the extension of *Elstad* to cases in which officers violate a defendant's Sixth Amendment rights by deliberately eliciting an uncounseled, post-indictment statement. App. 8a-10a. The court thus held that "[i]n the case of warned confessions that follow unwarned, uncounseled statements, . . . the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements . . . and the subsequent statements." App. 8a.

Having decided that *Elstad* governs, and having rejected application of the derivative-evidence rule, the court of appeals also applied the test articulated by the plurality in

*Missouri* v. *Seibert*, 124 S. Ct. 2601, 2612 (2004), for cases involving *Miranda* violations. *See* App. 11a-12a. Under that test, designed to determine the efficacy of *Miranda* warnings in ensuring a suspect's comprehension of his Fifth Amendment right to remain silent after having made an initial unwarned statement, the court held that the officers' conduct had not "vitiate[d] the effectiveness of the *Miranda* warnings given to [petitioner]." App. 11a. The court also found that petitioner's statement could be admitted under the separate test, again designed for cases involving *Miranda* violations, set forth in Justice Kennedy's concurring opinion in *Seibert*. *See* App. 12a.

Finally, the court of appeals determined that any error in admitting petitioner's jailhouse statement was harmless. *See* App. 12a-14a. The court acknowledged that "each of the government witnesses had numerous past convictions, had used illegal drugs extensively for a number of years, and were testifying pursuant to plea bargains in hopes of a reduced sentence." App. 13a. Yet, relying on a decision adjudicating a conceptually distinct sufficiency-of-the-evidence challenge, the court dismissed the relevance of the witnesses' backgrounds here, holding that "their credibility was for the jury to decide." *Id.* (citing *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 935 (8th Cir. 2000)). The court did not inquire whether the admission of petitioner's jailhouse statement contributed to the jury's partial crediting of the government witnesses' testimony, and thus to the resulting verdict. *Cf. Chapman* v. *California*, 386 U.S. 18, 24 (1967) ("the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). Rather, the court of appeals simply excised petitioner's jailhouse confession from the government's case and concluded that the remaining evidence was sufficient to support his conviction. Quoting another sufficiency-of-the-evidence case, the court reasoned that "[a]lthough a reasonable mind could entertain concerns about the reliability and consistency of [the government witnesses'] accounts given the witnesses' plea bargains,

criminal histories, and past drug use, the evidence presented by the government in this case is *sufficient* to prove the [petitioner] conspired to possess methamphetamine with intent to distribute." App. 13a-14a (internal quotation marks omitted, emphasis added) (quoting *United States* v. *Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)).*

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT *OREGON* V. *ELSTAD* DOES NOT APPLY TO VIOLATIONS OF THE SIXTH AMENDMENT, AND THAT SUCH CASES ARE INSTEAD GOVERNED BY THE TRADITIONAL DERIVATIVE-EVIDENCE RULE

This Court previously granted certiorari in petitioner's case to review the applicability of *Oregon* v. *Elstad*, 470 U.S. 298 (1985), to the admission of a suspect's statement that was derived from a Sixth Amendment violation. *See* 538 U.S. 905 (2003); Pet. for Writ of Certiorari, *Fellers* v. *United States*, No. 02-6320, at 17-23. Because the court of appeals' earlier decision had erroneously failed to find a Sixth Amendment violation, this Court, after correcting that error, remanded the case for the court of appeals to pass on the *Elstad* question first. The court of appeals has now done so, reaching the same result that this Court originally determined to review.

The court of appeals' decision, applying *Elstad* rather than the traditional derivative-evidence rule, is unprecedented and erroneous. Moreover, the decision poses a distinct danger to the Sixth Amendment right to counsel, for it provides the police with a road map to eviscerate the right of criminal defendants to legal assistance at a point where they are most vulnerable. Accordingly, this Court should grant

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* On a separate issue, the court of appeals held that petitioner was entitled to a new sentencing hearing based on this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). App. 14a-15a. The district court held that hearing on May 2, 2005, reducing petitioner's sentence to a term of 102 months' imprisonment.

review and make clear that *Elstad* does not permit the admission of the fruits of a Sixth Amendment violation.

1. This Court has consistently ruled that evidence obtained by or derived from unconstitutional conduct must be excluded from a defendant's criminal trial. *See, e.g., Wong Sun* v. *United States*, 371 U.S. 471, 484-485 (1963) (Fourth Amendment); *Brown* v. *Illinois*, 422 U.S. 590, 597-600 (1975) (same); *Kastigar* v. *United States*, 406 U.S. 441, 453-454, 461-462 (1972) (Fifth Amendment); *Chavez* v. *Martinez*, 538 U.S. 760, 768-770 (2003) (plurality opinion) (same); *United States* v. *Wade*, 388 U.S. 218, 239-241 (1967) (Sixth Amendment); *Nix* v. *Williams*, 467 U.S. 431, 441-443 (1984) (same). The last two cited decisions confirm that the derivative-evidence rule is fully applicable to the fruits of Sixth Amendment violations. For example, in *Wade*, which involved a violation of the respondent's Sixth Amendment right to the assistance of counsel at a pretrial identification lineup, the Court held that the admissibility of the subsequent courtroom identification was governed by the derivative-evidence rule of *Wong Sun*. *See Wade*, 388 U.S. at 239-241. The Court explained that "[a] rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one." *Id.* at 240.

Similarly, in *Nix*—which involved a violation of the same "deliberate elicitation" standard of *Massiah* v. *United States*, 377 U.S. 201 (1964), that is at issue here—the Court stated that "the 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment as well as of the Fifth Amendment." *Nix*, 467 U.S. at 442 (citing, *e.g.*, *Wade*, 388 U.S. 218). At issue in *Nix* was whether evidence pertaining to the discovery and condition of a murder victim's body was properly admitted at the defendant's trial, given that the police had discovered the body after deliberately eliciting incriminating statements from the defendant in the absence of counsel. *See id.* at 434. The Court held

that the derivative evidence was properly admitted because the government inevitably would have discovered it. *See id.* at 448-450. That holding confirms the applicability of the derivative-evidence rule in the Sixth Amendment context. Were the rule not applicable, there would have been no need for the Court even to address whether a new inevitable-discovery exception should be recognized.

Just last Term, in another *Elstad*-related case, the plurality in *United States* v. *Patane* confirmed that the traditional derivative-evidence rule governs in cases of Sixth Amendment violations. The *Patane* plurality specifically cited *Nix* as an application of the "fruit of the poisonous tree" doctrine "in the Sixth Amendment context" and noted that the doctrine "applies to illegally obtained evidence and other incriminating evidence derived from it." 124 S. Ct. 2620, 2629 (2004) (internal quotation marks, alterations, and emphasis omitted). The courts of appeals have followed this Court's lead, similarly holding that the derivative-evidence rule governs the admissibility of fruits of Sixth Amendment violations. *See United States* v. *Faulkingham*, 295 F.3d 85, 91, 94 (1st Cir. 2002); *United States* v. *Mitcheltree*, 940 F.2d 1329, 1343 (10th Cir. 1991); *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990); *United States* v. *Kimball*, 884 F.2d 1274, 1278 (9th Cir. 1989); *United States* v. *Tedford*, 875 F.2d 446, 450 (5th Cir. 1989).

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court concluded that the traditional derivative-evidence rule should not apply when the only government misconduct at issue was an inadvertent failure to give the full warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See Elstad*, 470 U.S. at 304. The Court held that in those circumstances, a defendant's subsequent confession may be admitted so long as it was preceded by *Miranda* warnings and was knowingly and voluntarily made. *See id.* at 309. This Court has not extended *Elstad* beyond its narrow *Miranda* context, nor has the Court announced any similar exception to the derivative-evidence rule in circumstances where the government has violated a defendant's Sixth Amendment right to the assis-

tance of counsel. And, to petitioner's knowledge, apart from the court of appeals' decision here, no court of appeals has extended *Elstad* to cases of Sixth Amendment violations. The court of appeals' decision in this case thus stands alone.

2. The court of appeals' decision is erroneous in two fundamental respects.

a. *First*, as the court of appeals itself acknowledged, this Court consistently has applied the derivative-evidence rule in cases involving constitutional violations. The Court recognized only a limited exception in *Elstad* due to the *absence* of any constitutional violation in that case. As the Court explained there, "[r]espondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation." 470 U.S. at 305. But, "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered even in the absence of a Fifth Amendment violation." *Id.* at 306. "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.* at 306 n.1. Thus, the Court rejected the respondent's argument there at its very root, concluding that the derivative-evidence rule does not apply with its normal breadth where the primary misconduct violates no constitutional standards itself. *See also id.* at 308 ("Since there was no actual infringement of the suspect's constitutional rights [in *Michigan* v. *Tucker*, 417 U.S. 433 (1974)], the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."). In contrast, the Court noted, official misconduct of constitutional magnitude "traditionally mandate[s] a broad application of the 'fruits' doctrine." 470 U.S. at 306.

The court of appeals acknowledged all of the above, but then refused to follow *Elstad*'s teachings based on the court of appeals' conclusion that *Elstad* should now be reinterpreted in the light of *Dickerson* v. *United States*, 530 U.S. 428 (2000). The court of appeals seized on this Court's statement in *Dickerson* that *Elstad* "refus[ed] to apply the

traditional 'fruits' doctrine developed in Fourth Amendment cases" based on "the fact that unreasonable searches under the Fourth Amendment are different from *unwarned interrogation* under the Fifth Amendment." 530 U.S. at 441 (emphasis added). Nothing in that sentence, however, suggests that this Court has abandoned its previous view in *Elstad* that mere "unwarned interrogation" does not amount to a violation of the Constitution and *for that reason* does not trigger the traditional derivative-evidence rule. Rather, *Dickerson* confirms *Elstad*'s premise—that unwarned interrogation, standing alone, should not "breed[] the same consequences as police infringement of a constitutional right." 470 U.S. at 304.

The court of appeals reached a contrary conclusion here only by ignoring this Court's subsequent cases. Since *Dickerson*, this Court has twice confirmed that an inadvertent *Miranda* violation alone—the illegality at issue in *Elstad*—does not constitute a violation of the Fifth Amendment. In *Chavez* v. *Martinez*, 538 U.S. 760 (2003), the plurality specifically quoted *Elstad* for the proposition that " '[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself,' " *id.* at 770 (plurality) (citation omitted), and Justice Kennedy agreed that a *Miranda* violation does not itself violate the Constitution, *see id.* at 789 (Kennedy, J., concurring in part, dissenting in part). In *Patane*, 124 S. Ct. at 2628, the plurality reiterated that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. So much was evident in many of our pre-*Dickerson* cases, and we have adhered to this view since *Dickerson*." Moreover, the *Patane* plurality opinion confirmed the very point that the court of appeals wrongly believed was undercut by *Dickerson*—that *Elstad*'s refusal to apply the traditional derivative-evidence rule there was premised squarely on the absence of a constitutional violation. *See Patane*, 124 S. Ct. at 2626. Indeed, for purposes of determining the derivative-evidence rule's applicability, the *Patane* plurality contrasted the unwarned

interrogation at issue in *Elstad* with actual violations of the Fourth, Fifth, *and Sixth Amendments*. *See id.* at 2629 (citing *Nix*, 467 U.S. at 441).

The important premise of *Elstad*—that the traditional derivative-evidence rule should not apply when the government misconduct at issue does not violate the Constitution itself—is absent in cases like the present one, where a court finds an actual violation of the Constitution. As this Court confirmed in its earlier decision, the officers violated the Sixth Amendment when they deliberately elicited a post-indictment, uncounseled statement from petitioner at his home. *See* App. 21a. Thus, like the Sixth Amendment violations in *Wade* and *Nix*, the primary illegality here mandates application of the derivative-evidence rule.

b. *Second*, and separately, the court of appeals also wrongly extended *Elstad* beyond its limited Fifth Amendment context. This Court has noted that each derivative-evidence inquiry should reflect "the distinct policies and interests" of the particular constitutional right at issue. *Brown* v. *Illinois*, 422 U.S. 590, 602 (1975). The *Elstad* rule for the admission of evidence derived from a *Miranda* violation was designed only to "satisf[y]" "the Fifth Amendment proscription against use of compelled testimony." 470 U.S. at 318. In that limited context, the rule is sensible. When officers elicit an initial voluntary confession from a suspect (even if they fail to comply in all respects with *Miranda*), the subsequent administration of *Miranda* warnings generally ensures that a confession given thereafter is also voluntary, and thereby addresses the central concern of the Fifth Amendment. *See id.* at 310-311. Thus, the Court held in *Elstad* that while an initial failure to administer the *Miranda* warnings warrants a presumption that any confession gained thereby was compelled, administration of the *Miranda* warnings prior to a second confession "ordinarily should suffice to remove the conditions" that warranted the presumption of compulsion with regard to the first confession. *Id.* at 314; *see also Missouri* v. *Seibert*, 124 S. Ct. 2601, 2612 (2004) (plurality) (noting that the *Miranda* warnings in

*Elstad* were understood to "present[] a genuine choice whether to follow up on the earlier admission").

Compulsion is not the focus of the Sixth Amendment. Rather, the principal purpose of the Sixth Amendment is to ensure that a person formally charged with a criminal offense has access to expert legal assistance at every critical stage of a criminal prosecution, thereby ensuring that he is not unfairly disadvantaged by an imbalance of skill and resources between himself and the prosecution. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 169 (1985); *United States* v. *Ash*, 413 U.S. 300, 309 (1973).

When officers deliberately elicit a post-indictment confession from an uncounseled defendant, subsequent *Miranda* warnings from the same officers are not sufficient alone to ensure that the central concerns of the Sixth Amendment are vindicated, especially when (as in this case) virtually no time has passed since the initial confession was illegally obtained. The warnings by themselves do not afford the defendant " 'the professional legal skill' " necessary to understand the situation into which the government's misconduct has thrust him. *Moulton*, 474 U.S. at 169. They do not inform the defendant, as counsel would, of the legal rules concerning the admissibility of the prior, deliberately elicited statement. Nor do the *Miranda* warnings provide the defendant legal advice regarding the true consequences of making an additional statement in these circumstances. There is accordingly a heightened danger that the defendant will decide to make a second statement based upon a lack of familiarity with his legal rights. In short, while the administration of *Miranda* warnings normally may remove the Fifth Amendment taint from a prior *Miranda* violation by adequately ensuring that a defendant understands he has a choice whether to speak further, *Miranda* warnings do not alleviate the distinct Sixth Amendment taint from the elicitation of a prior uncounseled statement by providing adequate legal advice to a defendant respecting whether he should exercise that choice to speak further under the circumstances.

The court of appeals elided this important distinction through a misplaced reliance on *Patterson* v. *Illinois*, 487 U.S. 285 (1988). This Court held in *Patterson* that a criminal defendant's waiver of his *Miranda* rights, made after a full provision of *Miranda* warnings, will suffice to waive the defendant's Sixth Amendment right to the assistance of counsel during pretrial questioning. *See id.* at 292-297. Accordingly, in such cases, post-waiver questioning ordinarily will not itself violate the Sixth Amendment. The question in this case, however, is not whether the police officers violated petitioner's Sixth Amendment right to counsel when they eventually furnished him with *Miranda* warnings and then interrogated him at the jailhouse. The police had *already* violated the Sixth Amendment, when they questioned petitioner at his home.

Rather, the question in this case is whether petitioner's jailhouse statement should be suppressed as the fruit of that *prior* Sixth Amendment violation at his home. *Patterson* did not announce any test for the admission of such derivative evidence, nor did it address the more specific question whether a *Miranda* warning is sufficient, standing alone, to secure the admissibility of evidence derived from a prior Sixth Amendment violation. Indeed, there was no government misconduct (and more particularly, no Sixth Amendment violation) preceding the waiver in *Patterson*, so the decision lacks the defining element of a derivative-evidence case like petitioner's. *See* 487 U.S. at 287-289. This Court simply had no occasion to establish a standard for admission of derivative evidence in circumstances where officers first unconstitutionally elicit an uncounseled, post-indictment statement.

When such government misconduct has already occurred, there is an important reason to distinguish between the Fifth and Sixth Amendments in analyzing the admissibility of derivative evidence. Counsel serves distinct purposes under the two Amendments when government officers have unlawfully elicited a first incriminating statement. For purposes of the Fifth Amendment, the assistance of counsel can

ensure that a defendant does not wrongly believe that he is *compelled* to speak further to the government. But, as this Court explained in *Elstad*, when the primary illegality at issue is an inadvertent *Miranda* violation alone, the subsequent administration of *Miranda* warnings prior to a second confession adequately ensures the voluntariness of that statement. *See* 470 U.S. at 310-311, 314. For purposes of the Sixth Amendment, however, the assistance of counsel ensures "equality in [the] adversary confrontation" by protecting the accused from his own "lack of familiarity with the law." *Ash*, 413 U.S. at 317. Counsel is important not simply to advise a defendant that he is not compelled to speak, but also to advise the defendant whether it is in his best interest, in light of the charges against him, to speak or remain silent. Thus, regardless whether counsel serves a similar role under the Fifth and Sixth Amendments at ordinary pretrial interrogations, as the court of appeals found based on *Patterson* (App. 8a-9a), counsel serves a broader Sixth Amendment interest in those circumstances where government officers have previously and unlawfully elicited incriminating information from a defendant. *Elstad*'s conclusion that *Miranda* warnings themselves can adequately safeguard the values protected by the Fifth Amendment does not translate to the Sixth Amendment context.

3. Having extended *Elstad* to petitioner's case, the court of appeals did not apply the traditional derivative-evidence rule. That failure had an important effect. As petitioner argued previously to this Court, his jailhouse confession should have been suppressed under that rule. *See, e.g.*, Brief for Pet., *Fellers* v. *United States*, No. 02-6320, at 26-30, 37-41.

Under the derivative-evidence rule, the government bears the burden of proving that "the connection between the lawless conduct of the police and the discovery of the challenged evidence ha[d] 'become so attenuated as to dissipate the taint' " of the prior constitutional violation. *Wong Sun* v. *United States*, 371 U.S. 471, 487 (1963) (quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939)); *see also, e.g.*,

*Kaupp* v. *Texas*, 538 U.S. 626, 632-633 (2003) (*per curiam*). When the derivative evidence is a defendant's incriminating statement, this Court has framed the inquiry as whether that statement was " 'sufficiently an act of free will to purge the primary taint.' " *Brown*, 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486).

"Free will," as used in the Court's derivative-evidence cases, means more than simply constitutional voluntariness (*i.e.*, absence of government coercion). It means a true break in the chain of causation establishing that the unconstitutional conduct did not influence the defendant to give the statement in question. A reviewing court must be convinced that the prior constitutional violation did "not play any meaningful part in the witness' willingness" to make an inculpatory statement. *United States* v. *Ceccolini*, 435 U.S. 268, 277 (1978).

This Court has recognized that *Miranda* warnings by themselves may well be insufficient to break the chain of causation from a constitutional violation. For example, when the government obtains a confession from a defendant following an illegal arrest, this Court's cases "firmly establish[] that the fact that the confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of an illegal arrest." *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982); *see also Brown*, 422 U.S. at 602 ("In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' " (quoting *Wong Sun*, 371 U.S. at 486)).

To determine whether the chain of causation from a constitutional violation has been broken, this Court has applied a multifactor attenuation test. Courts must consider, in addition to the presence of any *Miranda* warnings, the temporal proximity between the constitutional violation and the defendant's incriminating statement, the presence or

absence of intervening circumstances, and, particularly, the purpose and flagrancy of the violation. *See Kaupp*, 538 U.S. at 633; *Taylor*, 457 U.S. at 690; *Dunaway* v. *New York*, 442 U.S. 200, 218 (1979); *Brown*, 422 U.S. at 603-604. Given the clear force of the evidence in petitioner's case, the government cannot satisfy its burden to prove taint attenuation.

*First*, only a half-hour passed between the deliberate elicitation of the first statement from petitioner at his home and his subsequent confession at the jail. During this entire period, petitioner remained in the custody of the police officers. The exceedingly brief time period in petitioner's case is shorter than cases where the Court has found the temporal factor to favor exclusion of a subsequent confession. *See, e.g.*, *Taylor*, 457 U.S. at 691 (1982) (six hours); *Brown*, 422 U.S. at 604 (under two hours).

*Second*, no meaningful intervening event took place between the officers' confrontation of petitioner at his home and the subsequent interrogation at the jailhouse. Of particular importance here, given the Sixth Amendment context, is the fact that petitioner never consulted with counsel between the making of the two statements. Petitioner thus remained ignorant of his legal rights (including his right to suppress the first confession). There also was no other intervening circumstance (*e.g.*, an arraignment before a judge at which counsel was appointed) that "could possibly have contributed to [petitioner's] ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691; *cf. Brown*, 422 U.S. at 611 (Powell, J., concurring in part) ("some demonstrably effective break . . ., such as actual consultation with counsel or . . . presentation before a magistrate," should be required to attenuate taint of official conduct that is flagrantly abusive of constitutional rights).

*Third*, the flagrancy of the official misconduct is important. In *Massiah* and subsequent cases, this Court has set forth a clear and easily understood Sixth Amendment standard. As this Court earlier held in a unanimous decision, Deputy Bliemeister plainly violated that Sixth Amendment

standard, telling petitioner that he and his partner wanted to discuss with petitioner the controlled substances charges on which he had been indicted the previous day. *See* App. 21a.

The only factor supporting the government here is the police officers' administration of *Miranda* warnings prior to the jailhouse interrogation. In this respect, the case is similar to the Court's *per curiam* decision in *Kaupp*, where the Court explained: "The record before us shows that only one of these considerations, the giving of *Miranda* warnings, supports the state, and we held in *Brown* that '*Miranda* warnings, *alone* and *per se*, cannot always ... break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.'" 538 U.S. at 633 (quoting *Brown*, 422 U.S. at 603). Indeed, in *Brown*, *Dunaway*, and *Taylor* too, the Court held that confessions were inadmissible despite the administration of *Miranda* warnings. There is no reason that the provision of the warnings here, especially considering the ineffectiveness of such warnings in addressing the central concerns of the Sixth Amendment, should take petitioner's case outside the rationale of these decisions.

4. As the above analysis shows, application of the traditional derivative-evidence rule would require the suppression of petitioner's second statement. The court of appeals' error in departing from that traditional rule in favor of reliance on the inapposite decision in *Elstad* is a serious one that warrants review by this Court. If provision of *Miranda* warnings following a clear Sixth Amendment violation, such as occurred in this case, will be sufficient to eliminate any taint from that violation, then engaging in such violations will essentially become cost-free to the police.

As the Court has recognized in the Fourth Amendment context, a blanket rule that *Miranda* warnings are sufficient to break the link between unconstitutional conduct and a subsequent confession "eviscerate[s]" any incentive for government officers to avoid the improper conduct in the first instance, "making the warnings, in effect, a 'cure-all.'"

*Brown*, 422 U.S. at 602. That conclusion is even more apt with respect to the Sixth Amendment. To admit a deliberately elicited, uncounseled, post-indictment statement against the defendant at trial in cases involving *no* preceding Sixth Amendment violation, the prosecution already must show that a defendant waived his right to counsel and made his statement voluntarily. *See, e.g.*, *Patterson*, 487 U.S. at 292 (waiver); *Dickerson*, 530 U.S. at 434 (voluntariness). Under the court of appeals' ruling, however, the very same showing would be sufficient to establish the admissibility of a confession derived from an earlier Sixth Amendment violation. In the court of appeals' view, therefore, nothing at all is changed by the fact that the government has violated the Constitution. That approach is insufficient to protect the important interests safeguarded by the Sixth Amendment.

## II. THE COURT OF APPEALS' HARMLESS-ERROR HOLDING WARRANTS REVIEW BECAUSE IT CONTRAVENES WELL-ESTABLISHED PRECEDENT OF THIS COURT

The court of appeals held in the alternative that any error in petitioner's case was harmless. That ruling also warrants review by this Court. This Court's cases make clear the proper standard for harmless-error review. More than 35 years ago, this Court held in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), that a constitutional error in a criminal case may be treated as harmless only where it can be said "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The Court continues to apply the same *Chapman* standard today for direct review of constitutional errors. *See, e.g.*, *Neder* v. *United States*, 527 U.S. 1, 15 (1999) ("In *Chapman* v. *California*, we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (citation omitted)).

The court of appeals did not apply the *Chapman* standard. On appeal, petitioner argued that the admission of his jailhouse confession could not have been harmless given the substantial reliance the government placed on petitioner's

statement to corroborate and support the testimony of its severely credibility-challenged witnesses. *See* Supp. Br. of Def.-Appellant at 21-24. The court of appeals did not disagree that petitioner's statement had such a corroborative effect. Indeed, the court described the same effect itself. *See* App. 13a. Nevertheless, the court did not once conduct the inquiry prescribed by *Chapman* and make a determination whether the admission of petitioner's jailhouse confession (and the particular manner in which the government put it to use) contributed to the jury verdict by providing important corroborative support to the government's otherwise weak case.

Rather, relying on prior cases adjudicating defendants' challenges to the sufficiency of the evidence supporting their convictions, the court of appeals replaced the *Chapman* standard with the different and more government-favorable evidence-sufficiency standard:

> Although "a reasonable mind could entertain concerns about the 'reliability and consistency of [the government witnesses'] accounts' " given the witnesses' plea bargains, criminal histories, and past drug use, *the evidence presented by the government in this case is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute. Accordingly, any error in admitting [petitioner's] jailhouse statements was harmless.*

App. 13a-14a (emphasis added) (quoting *United States* v. *Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)).

This analysis was legally erroneous. Long ago, in *Kotteakos* v. *United States*, this Court explained that the harmless-error "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." 328 U.S. 750, 765 (1946); *see also id.* at 767 ("The Government's theory seems to be . . . that the error . . . is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a

separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under [the federal harmless error statute].”). More recently, in *Satterwhite* v. *Texas*, 486 U.S. 249, 258-259 (1988), the Court distinguished constitutional harmless-error review from sufficiency-of-the-evidence review in clear and certain terms: “The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” (quoting *Chapman*, 386 U.S. at 24).

In contrast to the decision below, other courts of appeals have followed this Court’s clear instructions that harmless-error review is not equivalent to sufficiency-of-the evidence review. *See, e.g.*, *United States* v. *Hands*, 184 F.3d 1322, 1329 (“An error may substantially influence an outcome and thus warrant reversal even if the evidence, had no error occurred, would have been sufficient to support the conviction.”), *corrected in other respects by* 194 F.3d 1186 (11th Cir. 1999); *United States* v. *Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998) (“[H]armless error review calls for an inquiry as to whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict.”); *United States* v. *Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995) (“The question is not whether, omitting the inadmissible statements, the record contains sufficient evidence for a jury to convict the defendant.”).

Had the court of appeals applied the correct *Chapman* standard, it could not have found the admission of petitioner’s jailhouse confession to be harmless. As noted (*supra*, at pp. 5-7), the government’s witnesses had severe credibility problems. Contrary to the court of appeals’ erroneous observation that the government witnesses’ testimony “went largely unchallenged” (App. 13a), petitioner’s counsel seized on the witnesses’ lack of credibility in cross-

examining each witness. Petitioner's counsel also focused his closing argument on the credibility issue, contending that the government witnesses' testimony should be disbelieved in its entirety. *See* TT 711-727. In response, in its closing argument, the government specifically relied on petitioner's jailhouse confession to support its witnesses, describing how "[petitioner's] own statements corroborate the testimony that has been presented by the other witnesses who have been brought in for you." TT 734; *see also* TT 704, 732-734. Yet, even with the erroneous admission of petitioner's jailhouse confession and the government's corroboration argument, petitioner's credibility argument clearly had an effect on the jury, which chose not to fully credit the government's witnesses. Although the government argued that the testimony of its witnesses made petitioner responsible for between 691 to 815 grams of methamphetamine (*see* TT 710), the jury found only between 50 and 500 grams involved in petitioner's offense (*see* TT 739).

In these circumstances, it is impossible to say that the admission of petitioner's jailhouse confession was harmless. As this Court has noted, "[a] confession is like no other evidence. The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) (internal quotation marks omitted). Absent petitioner's confession and its corroborative effect on the government witnesses' testimony, the jury might have discredited the government witnesses entirely. In similar circumstances in *Fulminante*, this Court found that the erroneous admission of the respondent's coerced confession could not have been harmless when the jury might have credited other evidence due to the improperly admitted confession. *See id.* at 1258-1259; *see also United States* v. *Noti*, 731 F.2d 610, 615-616 (9th Cir. 1984) (holding error not harmless where credibility of government witness was in dispute, yet jury likely credited witness in part due to corroboration by defendant's erroneously admitted statements). Moreover, petitioner's jailhouse statement was particularly damaging,

given that the government had charged him with conspiracy to possess with intent to distribute and petitioner admitted both his association with the alleged co-conspirators and having purchased methamphetamine from them.

The decision below reflects a basic misunderstanding about the nature of harmless-error review. That misunderstanding had a direct real impact on the outcome of the case. Accordingly, this Court should grant review to make clear that harmless-error review and sufficiency-of-the-evidence review are distinct and must remain so.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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MAY 2005

**APPENDIX A**

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
*Appellee,*

*v.*

JOHN J. FELLERS,
*Appellant.*

No. 01-2045

Submitted: Sept. 13, 2004
Filed: Feb. 15, 2005

[397 F.3d 1090]

Before WOLLMAN, LAY, and RILEY, Circuit Judges.

WOLLMAN, Circuit Judge.

This case returns to us on remand from the Supreme Court. We affirm Fellers's conviction, but remand to the district court for resentencing.

I.

Two policemen went to Fellers's home in Lincoln, Nebraska, to arrest him on February 24, 2000. After the officers entered the home, they told Fellers that a grand jury had indicted him for conspiracy to distribute methamphetamine, that the indictment concerned an alleged conspiracy with certain named persons, and that the officers had a federal warrant for his arrest. Fellers stated that he knew the co-conspirators in question and that he had used methamphetamine in the past.

After about 15 minutes, the officers arrested Fellers and transported him to jail. Fellers was booked and taken to an interview room, where the officers gave him a full

*Miranda* warning. Fellers waived his *Miranda* rights both verbally and in writing, repeated the statements he had made at his home, and stated that he had purchased methamphetamine from some of the co-conspirators named in the indictment. Fellers admitted knowing several more individuals and that he had purchased methamphetamine from some of them and used methamphetamine with some of them. He also stated that he had loaned money to another co-conspirator even though he suspected that the money might have been used for drug transactions. Throughout his jailhouse interrogation, however, Fellers repeatedly denied that he had ever sold methamphetamine.

Following a magistrate judge's hearing and recommendation, the district court suppressed the statements made at Fellers's **[1093]** home, but allowed Fellers's jailhouse statements to be introduced at trial. A jury found Fellers guilty of conspiracy to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, over Fellers's objection, the district court found that Fellers was actually responsible for more than 500 grams of methamphetamine and accordingly raised Fellers's base offense level from 30 to 32. The district court also raised Fellers's criminal history category from category II to category III based upon conduct underlying a prior guilty plea, even though the conviction entered pursuant to the plea was later expunged.

We upheld Fellers's conviction against Fifth and Sixth Amendment challenges and held that Fellers's jailhouse statements were admissible under *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). *United States v. Fellers*, 285 F.3d 721, 724 (8th Cir. 2002) (*Fellers I*). The Supreme Court reversed our decision and concluded that the officers had deliberately elicited the statements made at Fellers's home in violation of Fellers's Sixth Amendment right to counsel. *Fellers v. United States*, 540 U.S. 519, 524-25, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (*Fellers II*). The Court remanded the case to us for a determination whether Fellers's jailhouse statements should

be suppressed as fruits of the initial Sixth Amendment violation and whether the *Oregon v. Elstad* rationale "applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." *Id.* at 525, 124 S.Ct. 1019.

II.

Fellers argues that *Elstad* does not apply to violations of the Sixth Amendment because the *Elstad* rule was never designed to deal with actual violations of the Constitution. In addition, Fellers argues that *Elstad*—which was crafted to serve the Fifth Amendment—is inapplicable because it is ill-suited to serve the distinct concerns raised by the Sixth Amendment and because violations of the *Miranda* rule are fundamentally different from the Sixth Amendment violation at issue in this case. We disagree.

A.

In *Elstad*, the Supreme Court held that an initial failure to administer *Miranda* warnings, in the absence of actual coercion or tactics calculated to undermine an individual's free will, does not require the suppression of subsequent voluntary statements given after proper *Miranda* warnings and a valid waiver of *Miranda* rights. *Elstad*, 470 U.S. at 309, 105 S.Ct. 1285. Two policemen went to Elstad's home with a warrant for his arrest for burglary. While in Elstad's living room, one of the officers told Elstad that he believed that Elstad was involved in the burglary. Elstad responded, "Yes, I was there." The officers then took Elstad to the county sheriff's office and advised him of his *Miranda* rights approximately one hour later. Elstad indicated that he understood his rights and wished to waive them and speak with the officers. Elstad then gave and signed a full written statement regarding his involvement in the burglary. The trial court suppressed the initial statement made at Elstad's home, but admitted Elstad's signed, written confession. *Id.* at 300-02, 105 S.Ct. 1285. The Supreme Court affirmed the trial court's decision and held that the "fruit of the poisonous

tree" doctrine, which would have excluded the subsequent confession if it were tainted by the initial *Miranda* violation, was inapplicable in the *Miranda* context. *Id.* at 306-07, 105 S.Ct. 1285.

**[1094]** The Supreme Court stated in *Elstad* that its rejection of the exclusionary rule in the *Miranda* context was premised on the fact that a violation of *Miranda* was not, by itself, a violation of the Fifth Amendment and on the fact that the protections afforded by the *Miranda* rule sweep more broadly than the Fifth Amendment itself. *See id.* at 305-07, 105 S.Ct. 1285 ("Respondent's contention that his confession ... must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation."). The Court also stated that *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), stands for the proposition that constitutional violations mandate application of the fruits doctrine. *Elstad*, 470 U.S. at 308-09, 105 S.Ct. 1285. This justification for *Elstad*'s holding, however, was undercut by the Court in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In *Dickerson*, the Court held that *Elstad*'s rationale rested not on the fact that *Miranda* was not a constitutionally mandated rule, but instead on the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment. *Id.* at 441, 120 S.Ct. 2326. Additionally, we have interpreted *Dickerson* as "reaffirm[ing] the validity of *Elstad* by reaffirming the distinction between application of the exclusionary rule following Fourth and Fifth Amendment violations." *United States v. Villalba-Alvarado*, 345 F.3d 1007, 1012 (8th Cir. 2003).[1]

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[1] In *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), a majority of the Supreme Court concluded that a *Miranda* violation does not, without more, establish a completed violation of the Fifth Amendment. *Id.* at 772, 123 S.Ct. 1994 (plurality opinion), 538 U.S. at 789, 123 S.Ct. 1994 (Kennedy, J., concurring in part and dissenting in part). Neither opinion contradicts *Dickerson*'s analysis of *Elstad*'s constitutional underpinnings.

B.

Whether the exclusionary rule applies to evidence acquired subsequent to a constitutional violation requires consideration of the possible admissibility of the evidence in light of the "distinct policies and interests" of each Amendment. *See Elstad*, 470 U.S. at 306-07, 105 S.Ct. 1285; *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). When applied to a confession that is the fruit of unlawful police conduct, the exclusionary rule ensures that the fruits are excluded from trial unless they result from an "intervening act of free will" by the suspect. *Wong Sun*, 371 U.S. at 486, 83 S.Ct. 407.

Although the exclusionary rule is most often applied in the Fourth Amendment context, its application has not been limited to Fourth Amendment violations. *Nix v. Williams*, 467 U.S. 431, 442 & n.3, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The Supreme Court instead has applied the exclusionary rule to violations of both the Fifth and Sixth Amendment. *Id.* The Court has repeatedly noted, however, that the core reason for extending the exclusionary rule to these areas is to deter police from violating constitutional and statutory protections. *Id.* at 442-43, 104 S.Ct. 2501. *See also United States v. Patane*, --- U.S. ----, ----, 124 S.Ct. 2620, 2629, 159 L.Ed.2d 667 (2004) (plurality opinion). Another relevant consideration in extending the exclusionary rule is whether application of the rule would effectuate the purposes of the constitutional provision at issue. *See Brown*, 422 U.S. at 601, 95 S.Ct. 2254.

The Fourth Amendment traditionally mandates a "broad application" of the exclusionary rule. *Elstad*, 470 U.S. at 306, 105 S.Ct. 1285. The exclusionary rule **[1095]** operates in the Fourth Amendment context to deter unreasonable searches and seizures regardless of the probativeness of their fruits. *Id.* Where the fruits of the Fourth Amendment violation are confessions, courts apply the exclusionary rule to ensure that the confession is not causally linked to the initial illegality. *Brown*, 422 U.S. at 602-03, 95 S.Ct. 2254. By applying the exclusionary rule, courts "assure in every case

that the Fourth Amendment violation has not been unduly exploited," and thus effectuate the Fourth Amendment's purpose of prohibiting unreasonable searches and seizures. *Id.* at 603, 95 S.Ct. 2254. *Miranda* warnings do not obviate the need for the exclusionary rule in the Fourth Amendment context because the warnings cannot, "alone and per se," ensure that a voluntary confession taken subsequent to a Fourth Amendment violation was an act of free will sufficient to break the causal connection between the violation and the confession. *Id.*

The Fifth Amendment, in contrast, prohibits the prosecution from using compelled testimony in its case in chief and ensures that any evidence introduced at trial will be voluntary and thus trustworthy. *Elstad*, 470 U.S. at 306-08, 105 S.Ct. 1285. Because confessions or statements taken in violation of *Miranda* give rise to an irrebuttable presumption that they have been compelled, they must be excluded from the prosecution's case in chief. *Id.* at 307, 105 S.Ct. 1285. This presumption of compulsion, however, does not bar the use of unwarned statements for impeachment purposes. *Id.* In addition, as *Elstad* held, the presumption does not preclude the introduction of a subsequent warned statement at trial. *Id.* at 310-11, 105 S.Ct. 1285. Because the *Miranda* warnings give the suspect the information he needs to choose whether to exercise his right to remain silent, the suspect's choice to speak after receiving *Miranda* warnings is normally viewed as an "act of free will." *Id.* at 311, 105 S.Ct. 1285 (quoting *Wong Sun*, 371 U.S. at 486, 83 S.Ct. 407). Furthermore, because the introduction of the subsequent warned statement at trial entails no risk that compelled testimony will be used against a suspect, suppression of the subsequent warned statement neither deters violations of the Fifth Amendment nor ensures that the statement was not compelled. *Id.* at 308-09, 83 S.Ct. 407. Accordingly, the ordinary exclusionary rule gives way to the *Elstad* rule, and subsequent warned confessions given after initial *Miranda* violations are admissible.

The Sixth Amendment prohibits the use at trial of statements deliberately elicited from a suspect after he has been indicted and in the absence of counsel. *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). This rule serves to exclude uncounseled post-indictment statements taken in violation of the Sixth Amendment and thereby preserves the integrity and fairness of the criminal trial. *See Nix*, 467 U.S. at 446, 104 S.Ct. 2501.

We conclude that the exclusionary rule is inapplicable in Fellers's case because, as with the Fifth Amendment in *Elstad*, the use of the exclusionary rule in this case would serve neither deterrence nor any other goal of the Sixth Amendment. Both the deterrence of future Sixth Amendment violations and the vindication of the Amendment's right-to-counsel guarantee have been effectuated through the exclusion of Fellers's initial statements. Although the officers acknowledged that they used Fellers's initial jailhouse statements (obtained after securing a *Miranda* waiver) in order to extract further admissions from him, there is no indication that the interrogating officers made any reference to Fellers's prior uncounseled statements in order to prompt **[1096]** him into making new incriminating statements. In addition, because Fellers's initial statements related to persons already named in the indictment and to his own personal use of methamphetamine (the drug he was accused of conspiring to distribute and to possess with intent to distribute), the officers would have had a basis for the questions asked during the jailhouse interrogation even if Fellers had said nothing at all at his home. Furthermore, although Fellers's subsequent statements did reestablish matters addressed by his prior unwarned statements, Fellers also made numerous statements about parties, events, and activities not covered in his prior statements. Accordingly, suppression of Fellers's subsequent statements would not promote the fairness of the trial process because their introduction was not unfair to Fellers.

Our conclusion is consistent with historical applications of the exclusionary rule in the Sixth Amendment context. In such cases, evidence acquired after a Sixth Amendment violation is excluded in the absence of proof that the Sixth Amendment violation did not contribute to or produce the subsequent evidence. *See, e.g., United States v. Wade*, 388 U.S. 218, 235-37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (excluding identification testimony given subsequent to a post-indictment lineup at which the accused's counsel was not present in violation of the Sixth Amendment). In the case of warned confessions that follow unwarned, uncounseled statements, however, the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements (which have already been suppressed) and the subsequent statements.

C.

The similarities between the Sixth Amendment context at issue in Fellers's case and the Fifth Amendment context at issue in *Elstad* support our conclusion that the *Elstad* rule applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel, notwithstanding earlier police questioning in violation of the Sixth Amendment. Although the Supreme Court has never explicitly stated that the *Elstad* rationale is applicable to Sixth Amendment violations, it has emphasized the similarity between pre-indictment suspects subjected to custodial interrogation and post-indictment defendants subjected to questioning.

The Court has held that the scope of the right to counsel varies depending upon the usefulness of counsel to the accused at a particular proceeding and the dangers to the accused of proceeding without counsel. *Patterson v. Illinois*, 487 U.S. 285, 298, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). Unlike during trial, where the accused truly requires aid in meeting his legal adversary, the full "dangers and disadvantages of self-representation" during post-indictment questioning are more apparent to an accused. *Id.* at 298-300, 108

S.Ct. 2389. Furthermore, because "[t]he State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning or expand the limited purpose that an attorney serves when the accused is questioned by authorities," there is no significant difference between a lawyer's usefulness to a suspect during pre-indictment custodial interrogation and his usefulness at post-indictment questioning. *Id.* at 298-99, 108 S.Ct. 2389. An accused is thus permitted to waive his right to counsel as an initial matter after **[1097]** receiving proper *Miranda* warnings. *Id.* at 293-94, 108 S.Ct. 2389. Such warnings alert the accused to the possible consequences of going forward without counsel during questioning. *Id.* at 293, 108 S.Ct. 2389. In addition, as in the case of unwarned statements taken in violation of *Miranda*, uncounseled statements obtained in violation of the Sixth Amendment may be used at trial for impeachment purposes. *See Michigan v. Harvey*, 494 U.S. 344, 350-52, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). Accordingly, a warned post-indictment accused subjected to questioning is similarly situated with a warned pre-indictment suspect subjected to custodial interrogation.

In contrast with the statements made at Fellers's home, Fellers's jailhouse statements were given after a proper administration of *Miranda* warnings and a proper oral and written waiver of his *Miranda* rights. The *Miranda* warnings fully informed Fellers of "the sum and substance" of his Sixth Amendment rights, and his waiver of his *Miranda* rights operated as a knowing, intelligent, and voluntary waiver of his right to counsel. *Patterson*, 487 U.S. at 293-94, 108 S.Ct. 2389. He was thus given all of the information he needed to decide whether to invoke his Sixth Amendment rights.[2] Furthermore, no evidence indicates that either

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[2] Fellers's suggestion that the psychological effect of the first statement inherently taints the second statement or coerces a post-indictment accused into expanding upon statements previously made because the

Fellers's initial statements or his subsequent jailhouse statements were coerced, compelled, or otherwise involuntary. As a result, the condition that made his prior statements inadmissible—the inability to have counsel present or to waive the right to counsel—was removed. *See Elstad*, 470 U.S. at 314, 105 S.Ct. 1285.

The Supreme Court's decision in *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), is not to the contrary. Fellers's Sixth Amendment right to counsel certainly accrued after his indictment, but that fact has no bearing on his ability to waive that right in the first instance. *See Patterson*, 487 U.S. at 290-91, 108 S.Ct. 2389 (fact that suspect's Sixth Amendment right was in existence at time of questioning did not distinguish him from preindictment interrogatee, who also has a right to counsel in existence at time of questioning). Furthermore, *Jackson* does not bar a post-indictment accused from making an *initial* election whether to proceed with questioning through counsel. *Id.* at 291, 108 S.Ct. 2389. Because Fellers initially chose to go forward without counsel, there is no reason to exclude his uncounseled statements. *Id.*

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first statement "let the cat out of the bag" has been squarely rejected by the Supreme Court. In *Elstad*, the Court stated that it had "never held that the psychological impact of voluntary disclosure of a guilty secret . . . compromises the voluntariness of a subsequent informed waiver." *Elstad*, 470 U.S. at 312, 105 S.Ct. 1285. Although the *Elstad* Court addressed the issue in Fifth Amendment terms, its analysis is equally applicable in this case because of the similarities between a pre-indictment suspect subjected to custodial interrogation and a post-indictment accused subjected to questioning. Furthermore, even if Fellers was unaware of the fact that his prior statements could not be used against him, that ignorance did not compromise the voluntariness of his subsequent waiver of the right to counsel. *See id.* at 316, 105 S.Ct. 1285 ("This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."); *see also Patterson*, 487 U.S. at 297, 108 S.Ct. 2389.

D.

Finally, we conclude that the officers' conduct in this case did not vitiate the effectiveness of the *Miranda* warnings given **[1098]** to Fellers. We apply a multi-factor test derived from the Supreme Court's recent plurality opinion in *Missouri v. Seibert*, --- U.S. ----, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), in order to determine whether *Miranda* warnings delivered between two interrogation sessions are sufficient to fully inform a suspect of his *Miranda* rights. *United States v. Aguilar*, 384 F.3d 520, 524 (8th Cir. 2004). We consider: (1) the extent of the first round of interrogation; (2) the extent to which the first and second rounds of interrogation overlap; (3) the timing and setting of both questioning sessions, including whether a continuity of police personnel existed; and (4) the extent to which the interrogator's questions treated the second round as continuous with the first. *Id.*

In Fellers's case, the facts are much closer—if not identical—to the facts at issue in *Elstad* than to the facts at issue in *Seibert* or *Aguilar*. As in *Elstad*, the unwarned conversation at Fellers's home was relatively brief. Although the same officers that deliberately elicited statements from Fellers at his home also conducted Fellers's jailhouse interrogation, that interrogation took place almost one half hour later than the conversation at Fellers's home and in a new and distinct setting. In addition, while Fellers's warned jailhouse statements overlapped to a small degree with his initial unwarned, uncounseled admissions, the jailhouse interrogation went well beyond the scope of Fellers's initial statements by inquiring about different co-conspirators and different allegations. There is also no indication that the officers in this case treated the two rounds of interrogation as continuous, such as by using statements from the unwarned conversation to prompt admissions after receipt of a *Miranda* waiver. *See Seibert*, --- U.S. at ----, 124 S.Ct. at 2606.

These facts are distinguishable from those in *Seibert* and *Aguilar*, where two almost co-extensive interrogations took

place in the same interrogation room with little or no break between them. *See id.* at 2606, 2612 ("When the police were finished there was little, if anything, of incriminating potential left unsaid."); *Aguilar*, 384 F.3d at 525. The subsequent *Miranda* warnings thus presented Fellers with a "new and distinct experience" as well as a "genuine choice whether to follow up on the earlier admission." *Seibert*, 124 at 2612. Given these circumstances, then, to admit Fellers's jailhouse statements is not to fashion a rule that would permit an "end run around *Miranda*." *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989) (discussing situation in which officers obtained unwarned admissions from suspect and obtained identical warned handwritten admissions immediately thereafter).

Fellers's case also comports with Justice Kennedy's concurrence in *Seibert*. --- U.S. at ----, 124 S.Ct. at 2614. *See also United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."). Under Justice Kennedy's framework, the *Elstad* rule applies in the Fifth Amendment context only in the absence of a deliberate law enforcement strategy designed to obtain incriminating statements in violation of *Miranda*. *Briones*, 390 F.3d at 613. Because there is no evidence that the officers in this case employed such a deliberate strategy, the concerns voiced by Justice Kennedy are satisfied.

III.

Even if Fellers's jailhouse statements should have been suppressed, any error in admitting those statements at trial was harmless beyond a reasonable doubt. Although a defendant's own confession is **[1099]** "a particularly potent piece of evidence," its erroneous introduction is harmless where the other evidence against him is so substantial that it "assured beyond a reasonable doubt that the jury would have returned a conviction even absent the confession." *United States v. Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000) (internal citations omitted).

Fellers's jailhouse statements, in which he admitted knowing certain co-conspirators and using methamphetamine with them, were either corroborated by other government witnesses or were immaterial to the case. The testimony of each of these corroborating witnesses went largely unchallenged. Although each of the government witnesses had numerous past convictions, had used illegal drugs extensively for a number of years, and were testifying pursuant to plea bargains in hopes of a reduced sentence (all of which was made known to the jury through both testimony and exhibits), their credibility was for the jury to decide. *See, e.g., United States v. Aguayo-Delgado*, 220 F.3d 926, 935 (8th Cir. 2000).

Furthermore, it is notable that although Fellers admitted to knowing numerous co-conspirators and to using and purchasing methamphetamine, he vehemently denied selling or distributing methamphetamine. Fellers's trial counsel used this fact in his closing argument and intimated that Fellers was not involved in the distribution of methamphetamine because a police officer who was trained to elicit the truth from suspects could not elicit an admission of distribution from Fellers. Accordingly, the introduction of Fellers's jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute.

To prove conspiracy to distribute or to possess methamphetamine with intent to distribute, "the government must prove that two or more persons reached an agreement to distribute or possess with intent to distribute methamphetamine, that the defendant voluntarily and intentionally joined the agreement, and that at the time that the defendant joined the agreement he knew its essential purpose." *United States v. Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003). At trial, the government presented eight witnesses who detailed the extent of the conspiracy as well as Fellers's involvement in both possession and distribution of methamphetamine. Although "a reasonable mind could

entertain concerns about 'the reliability and consistency of these accounts' " given the witnesses' plea bargains, criminal histories, and past drug use, *see id.*, the evidence presented by the government in this case is sufficient to prove that Fellers conspired to possess methamphetamine with intent to distribute. Accordingly, any error in admitting Fellers's jailhouse statements was harmless.

**IV.**

Fellers last contends that the district court improperly enhanced his sentence based on facts not found by a jury, admitted by him, or proved beyond a reasonable doubt. Specifically, he argues that both the district court's increase of the drug quantity attributable to him beyond that found by the jury and the district court's reliance on facts underlying a prior expunged conviction—as opposed to the fact of the conviction itself—in order to increase his criminal history category violate his Sixth Amendment right to trial by jury.

In its recent decision in *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the Supreme Court held that the mandatory federal sentencing guidelines system was unconstitutional and that "[a]ny fact (other than a prior conviction) which is necessary to support **[1100]** a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 755-56. Because the jury in Fellers's case specifically found that Fellers was responsible for between 50 and 500 grams of methamphetamine and specifically rejected an alternative verdict stating that Fellers was responsible for more than 500 grams of methamphetamine, the district court's decision to enhance Fellers's sentence based upon the latter figure was in error. Because Fellers

raised this issue at sentencing, he is entitled to a new sentencing hearing.[3]

Fellers's conviction is affirmed, but his case is remanded for resentencing in accordance with *Booker*.

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[3] Because the district court's enhancement of Fellers's sentence based upon an increased drug quantity entitles him to a resentencing in and of itself, we see no need to decide whether the increase in his criminal history category similarly entitles him to relief. We note, however, that the conduct underlying the expunged offense was admitted by the defendant in the context of a guilty plea.

**APPENDIX B**

SUPREME COURT OF THE UNITED STATES

JOHN J. FELLERS,
*Petitioner*,

*v.*

UNITED STATES

No. 02-6320

Argued Dec. 10, 2003
Decided Jan. 26, 2004

[540 U.S. 519]

Justice O'CONNOR delivered the opinion of the Court.

After a grand jury indicted petitioner John J. Fellers, police officers arrested him at his home. During the course of the arrest, petitioner made several inculpatory statements. **[521]** He argued that the officers deliberately elicited these statements from him outside the presence of counsel, and that the admission at trial of the fruits of those statements therefore violated his Sixth Amendment right to counsel. Petitioner contends that in rejecting this argument, the Court of Appeals for the Eighth Circuit improperly held that the Sixth Amendment right to counsel was "not applicable" because "the officers did not interrogate [petitioner] at his home." 285 F.3d 721, 724 (2002). We granted the petition for a writ of certiorari, 538 U.S. 905, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003), and now reverse.

I

On February 24, 2000, after a grand jury indicted petitioner for conspiracy to distribute methamphetamine, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister went to petitioner's home in Lincoln, Nebraska, to arrest him. App. 111. The officers

knocked on petitioner's door and, when petitioner answered, identified themselves and asked if they could come in. *Ibid.* Petitioner invited the officers into his living room. *Ibid.*

The officers advised petitioner they had come to discuss his involvement in methamphetamine distribution. *Id.*, at 112. They informed petitioner that they had a federal warrant for his arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine. *Ibid.* The officers told petitioner that the indictment referred to his involvement with certain individuals, four of whom they named. *Ibid.* Petitioner then told the officers that he knew the four people and had used methamphetamine during his association with them. *Ibid.*

After spending about 15 minutes in petitioner's home, the officers transported petitioner to the Lancaster County jail. *Ibid.* There, the officers advised petitioner for the first time of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). App. 112. Petitioner and the two officers signed a *Miranda* waiver **[522]** form, and petitioner then reiterated the inculpatory statements he had made earlier, admitted to having associated with other individuals implicated in the charged conspiracy, App. 29-39, and admitted to having loaned money to one of them even though he suspected that she was involved in drug transactions, *id.*, at 34.

Before trial, petitioner moved to suppress the inculpatory statements he made at his home and at the county jail. A Magistrate Judge conducted a hearing and recommended that the statements petitioner made at his home be suppressed because the officers had not informed petitioner of his *Miranda* rights. App. 110-111. The Magistrate Judge found that petitioner made the statements in response to the officers' "implici[t] questions," noting that the officers had told petitioner that the purpose of their visit was to discuss his use and distribution of methamphetamine. *Id.*, at 110. The Magistrate Judge further recommended that portions of petitioner's jailhouse statement be suppressed as fruits of

the prior failure to provide *Miranda* warnings. App. 110-111.

The District Court suppressed the "unwarned" statements petitioner made at his house but admitted petitioner's jailhouse statements pursuant to *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), concluding petitioner had knowingly and voluntarily waived his *Miranda* rights before making the statements. App. 112-115.

Following a jury trial at which petitioner's jailhouse statements were admitted into evidence, petitioner was convicted of conspiring to possess with intent to distribute methamphetamine. Petitioner appealed, arguing that his jailhouse statements should have been suppressed as fruits of the statements obtained at his home in violation of the Sixth Amendment. The Court of Appeals affirmed. 285 F.3d 721 (C.A.8 2002). With respect to petitioner's argument that the officers' failure to administer *Miranda* warnings at his home violated his Sixth Amendment right to counsel under **[523]** *Patterson*, *supra*, the Court of Appeals stated: "*Patterson* is not applicable here . . . for the officers did not interrogate [petitioner] at his home." 285 F.3d, at 724. The Court of Appeals also concluded that the statements from the jail were properly admitted under the rule of *Elstad*, *supra*. 285 F.3d, at 724 (" 'Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made' " (quoting *Elstad*, *supra*, at 309, 105 S.Ct. 1285)).

Judge Riley filed a concurring opinion. He concluded that during their conversation at petitioner's home, officers "deliberately elicited incriminating information" from petitioner. 285 F.3d, at 726-727. That "post-indictment conduct outside the presence of counsel," Judge Riley reasoned, violated petitioner's Sixth Amendment rights. *Id.*, at 727. Judge Riley nevertheless concurred in the judgment, concluding that the jailhouse statements were admissible under

the rationale of *Elstad* in light of petitioner's knowing and voluntary waiver of his right to counsel. 285 F.3d, at 727.

II

The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated . . . 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)). We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); cf. *Patterson v. Illinois*, *supra* (holding that the Sixth Amendment does not bar postindictment questioning in the absence of counsel if a defendant waives the right to counsel).

**[524]** We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, *see United States v. Henry*, 447 U.S. 264, 270, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) ("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements . . . within the meaning of *Massiah*"); *Brewer*, *supra*, at 399, 97 S.Ct. 1232 (finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information from [the suspect]"), and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard, *see Michigan v. Jackson*, 475 U.S. 625, 632, n.5, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) ("[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability"); *Rhode Island v. Innis*, 446 U.S. 291, 300, n.4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessar-

ily interchangeable"); cf. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (holding that the Sixth Amendment provides the right to counsel at a postindictment lineup even though the Fifth Amendment is not implicated).

The Court of Appeals erred in holding that the absence of an "interrogation" foreclosed petitioner's claim that the jailhouse statements should have been suppressed as fruits of the statements taken from petitioner at his home. First, there is no question that the officers in this case "deliberately elicited" information from petitioner. Indeed, the officers, upon arriving at petitioner's house, informed him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators. 285 F.3d, at 723; App. 112. Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' **[525]** actions did not violate the Sixth Amendment standards established in *Massiah*, *supra*, and its progeny.

Second, because of its erroneous determination that petitioner was not questioned in violation of Sixth Amendment standards, the Court of Appeals improperly conducted its "fruits" analysis under the Fifth Amendment. Specifically, it applied *Elstad*, *supra*, to hold that the admissibility of the jailhouse statements turns solely on whether the statements were "'knowingly and voluntarily made.'" 285 F.3d, at 724 (quoting *Elstad*, *supra*, at 309, 105 S.Ct. 1285). The Court of Appeals did not reach the question whether the Sixth Amendment requires suppression of petitioner's jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard. We have not had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding ear-

lier police questioning in violation of Sixth Amendment standards. We therefore remand to the Court of Appeals to address this issue in the first instance.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## APPENDIX C

## UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
*Appellee,*

*v.*

JOHN J. FELLERS,
*Appellant.*

No. 01-2045

Submitted: Oct. 16, 2001
Filed: April 8, 2002
Rehearing Denied: May 7, 2002

[285 F.3d 721]

Before: WOLLMAN,[1] Chief Judge, LAY, and RILEY, Circuit Judges.

WOLLMAN, Chief Judge.

John Fellers appeals from the judgment of conviction entered and the sentence imposed by the district court[2] for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

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[1] The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

[2] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

I.

On February 24, 2000, two policemen went to Fellers's Lincoln, Nebraska, home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his *Miranda* rights.

The officers then escorted Fellers to jail, where they advised him of his *Miranda* rights. Fellers signed a written *Miranda* waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. A magistrate judge found that both sets of statements should be suppressed because Fellers was in custody at the time he made the statements at his home, the officers used deceptive stratagems to prompt those statements, and the subsequent statements at the jail would not have been made but for the prior ill-gotten statements. The district court agreed that the statements made at Fellers's home should be suppressed, but admitted the statements made at the jail after finding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making those statements.

The jury found that Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, the district court held Fellers responsible for more than 500 grams of methamphetamine and denied Fellers's request for a mitigating role adjustment, as well as his motion for a downward departure. After finding that category II did not adequately reflect the seriousness of Fellers's past criminal conduct, the

district court raised Fellers's criminal history category to III and sentenced him to 151 months' imprisonment.

[724]

II.

Fellers argues that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail.

The voluntariness of a confession is a legal inquiry subject to plenary appellate review. *United States v. Robinson*, 20 F.3d 320, 322 (8th Cir. 1994). To determine if Fellers's inculpatory statements at the jail were voluntary, we must determine if, "in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will. Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense." *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)) (internal citation omitted).

Contrary to Fellers's contention otherwise, we conclude that *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), renders admissible the statements made by Fellers at the jail. In that case, two officers went to Elstad's residence with a warrant to arrest him for the burglary of a neighbor's home. One of the officers told Elstad that he believed that Elstad had been involved in the burglary, whereupon Elstad responded "Yes, I was there." The officers then transported Elstad to the sheriff's office, where, approximately one hour later, they advised Elstad of his *Miranda* rights. Elstad indicated that he understood his rights and that he wished to waive them. Elstad then signed a written statement explaining his role in the burglary. The trial court suppressed Elstad's initial oral statement, but admitted his written confession. *Id.* at 300-302, 105 S.Ct. 1285. In holding that the statement given at the sheriff's office was admissible, the Court stated:

> It [would be] an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

*Elstad*, 470 U.S. at 309, 105 S.Ct. 1285.

Citing *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), Fellers argues that the officers' failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel inasmuch as the encounter constituted a post-indictment interview. *Patterson* is not applicable here, however, for the officers did not interrogate Fellers at his home.

Finally, we conclude that the record amply supports the district court's finding that Fellers's jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning. *See Elstad*, 470 U.S. at 314-15, 105 S.Ct. 1285; *Robinson*, 20 F.3d at 322. Accordingly, the district court did not err in denying the motion to suppress the statements made at the jail.

## III.

Fellers argues that the district court should not have admitted methamphetamine seized from a co-conspirator. We review under an abuse of discretion standard a district court's rulings on the **[725]** admissibility of evidence. We find no abuse of discretion here, for the evidence established that the seized drugs were part of the on-going conspiracy for which Fellers was prosecuted. *United States v. Maynie*, 257 F.3d 908, 915 (8th Cir. 2001).

Fellers next argues that the district court erred in limiting his cross examination of a witness. "Absent a clear abuse of discretion and a showing of prejudice, we will not reverse a district court's ruling limiting cross-examination of a prosecution witness on the basis that it impermissibly infringed [the defendant's] right of confrontation." *United States v. Stewart*, 122 F.3d 625, 627 (8th Cir. 1997). The record reveals that Fellers was allowed to cross-examine the witness about the issues with which he was concerned, and thus we find no abuse of discretion in the district court's ruling.

Fellers contends that the evidence was insufficient to support the verdict. "When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and give the government the benefit of all reasonable inferences. We will reverse 'only if a reasonable jury must have had a reasonable doubt that the elements of the crime were established.'" *United States v. Santana*, 150 F.3d 860, 864 (8th Cir. 1998) (quoting *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997)) (internal quotations and citations omitted). Fellers's argument rests almost entirely on his assertion that the testimony of his co-conspirators was not credible and should have been disregarded. "Assessing the credibility of witnesses is a matter properly left to the jury." *Santana*, 150 F.3d at 864 (citing *United States v. Anderson*, 78 F.3d 420, 422-23 (8th Cir. 1996)). The jury heard testimony from multiple witnesses that they bought from and sold to Fellers methamphetamine, including testimony that the quantities sold to Fellers were sufficient for redistribution to others. This testimony was sufficient to support Fellers's conviction.

Fellers contends that the court erred in denying his motion for a new trial based upon newly discovered evidence.

> We review under an abuse of discretion standard the denial of a motion for a new trial. A defendant is entitled to a new trial based on newly discovered evidence only if he can show (1) that the evidence was not discovered until after the trial; (2) that due

> diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to acquittal.

*United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001) (citing *Lindhorst v. United States*, 658 F.2d 598, 602 (8th Cir. 1981)). Because the new evidence Fellers points to is merely impeachment evidence, the district court did not abuse its discretion in denying the motion.

**IV.**

Fellers's remaining arguments concern alleged errors committed in calculating his sentence under the Sentencing Guidelines.

Fellers argues that the district court erred in calculating the amount of drugs for which he was responsible. "We review a district court's drug quantity calculations for clear error, and we will reverse only if our examination of the entire record 'definitely and firmly convinces us that a mistake has been made.'" *Santana*, 150 F.3d at 864 (quoting *United States v. Moss*, 138 F.3d 742, 745 (8th Cir. 1998)). The jury found that Fellers was responsible for at least 50 but less than 500 grams of methamphetamine. The district court determined that the quantity of methamphetamine that was reasonably foreseeable **[726]** to Fellers during the course of the conspiracy was more than 500 grams but less than 1.5 kilograms, a finding that we conclude is not clearly erroneous. Fellers argues that even though his sentence does not exceed the statutory maximum allowable under the jury's verdict, the sentence should be reversed because it is based upon a finding of drug quantity that exceeds that found by the jury. Fellers acknowledges that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not require such a result, and we decline to extend *Apprendi* to encompass Fellers's situation. As we held in *United States v. Hollingsworth*, 257 F.3d 871, 878 (8th Cir. 2001), it is "proper for the sentencing judge to then make

more exact calculations for purposes of computing the offense level under the guidelines and determining where the sentence will actually fall within the statutory range determined by the jury's verdict."

Fellers contends that the district court erred in finding that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. We review the district court's departure from the Sentencing Guidelines for an abuse of discretion. *United States v. Payne*, 940 F.2d 286, 293 (8th Cir. 1991). The court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. Without recounting the details of Fellers's past criminal conduct, we conclude that the district court did not abuse its discretion in determining that an upward departure was warranted.

Fellers challenges district court's denial of his motion for downward departure. So long as a district court is aware of its authority to depart downward, as it clearly was in this case, its refusal to exercise its discretion to depart from the applicable guideline range is unreviewable, *United States v. Evidente*, 894 F.2d 1000, 1004-05 (8th Cir. 1990), and thus Fellers's challenge fails.

Finally, Fellers argues that the district court erred in denying him a two-level reduction as a minor participant. "[W]hether a defendant qualifies for a minor participant reduction is a question of fact, the determination of which we review for clear error." *United States v. Alverez*, 235 F.3d 1086, 1090 (8th Cir. 2000) (quoting *United States v. Hale*, 1 F.3d 691, 694 (8th Cir. 1993)). Fellers argues that he was less culpable than other participants because the majority of the evidence showed him as receiving the drugs, not distributing them. There was sufficient evidence indicating that Fellers had a larger role in the conspiracy than being a mere user, however, and thus the district court did not err in finding that Fellers was not a minor participant in the conspiracy.

The judgment is affirmed.

RILEY, Circuit Judge, concurring.

In all respects but one, I concur in the Court's well-reasoned opinion. My disagreement, which does not affect the ultimate resolution of this case, concerns whether the arresting officers violated Fellers's right to counsel under the Sixth Amendment.

Because Fellers was under indictment at the time of his arrest, he had a constitutional right to the presence of counsel during police interrogation. *Massiah v. United States*, 377 U.S. 201, 205-06, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). For purposes of this right, an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant. *See id.* at 206, 84 S.Ct. 1199. Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating **[727]** information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. This post-indictment conduct outside the presence of counsel violated Fellers's right to counsel under the Sixth Amendment. *See United States v. Henry*, 447 U.S. 264, 270-71, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Brewer v. Williams*, 430 U.S. 387, 399-401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *cf. Rhode Island v. Innis*, 446 U.S. 291, 300-02 & 300 n.4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Nevertheless, I do not believe this constitutional violation takes Fellers's case outside the rationale of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret . . . compromises the voluntariness of a subsequent informed waiver." *Id.* at 312, 105 S.Ct. 1285. Fellers knowingly and voluntarily waived his Sixth Amendment rights at the jail, and his subsequent statements were thus admissible at his criminal trial. Accordingly, I concur in the judgment of the Court.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

JOHN J. FELLERS,
*Defendant.*

No. 4:00CR3014

## MEMORANDUM AND ORDER

This matter is before the Court on the report and recommendation of the magistrate judge (Filing No. 21, pp. 102-108), the defendant's objection to the report and recommendation (Filing No. 22), and the government's objection to the magistrate judge's report and recommendation (Filing No. 23). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of defendant's motion, the transcript of the hearing on said motion (Filing No. 21), the magistrate judge's report and recommendation, the objections of the parties, together with their supporting briefs.

The magistrate judge found that the defendant was in custody at the time he made certain statements in his home, that he was not Mirandized and that his statements were in response to statements of the officers which the magistrate judge found to be implicitly questions. The magistrate judge further found that no strong-armed tactics were used, but he did find there was use of deceptive stratagems in that the officers told the defendant the purpose of their visit was to discuss his role in methamphetamine use and distribution when their primary purpose was to arrest him. The magistrate judge concluded that all statements made by the defendant at his home prior to his being taken to the police station and the reading of his *Miranda* rights and all state-

ments made by the defendant at the police station which referred to or addressed the specific individuals who were identified by the officers at defendant's home prior to his formal arrest and transportation to the police station be suppressed.

The government's motion seeks an order from the Court rejecting the magistrate judge's report and recommendation in its entirety and denying defendant's motion to suppress. The defendant's objections specifically seek a clearer definition of the scope of the magistrate judge's order of suppression. The Court finds that the magistrate judge's recommendation is too broad and that it should be accepted by the Court only to the extent that all comments or statements made by the defendant at his home prior to his being taken to the police station should be suppressed. The Court finds that defendant was properly given his *Miranda* warnings, that he acknowledged he understood them and that he knowingly and voluntarily consented to speak with the officers, and, therefore, statements he made thereafter are admissible to the extent that they are relevant to any of the issues in the case.

**DISCUSSION**

Briefly, the Court notes that on February 24, 2000, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister, went to the home of John Fellers for the purpose of arresting him (Filing No. 23, p. 7:11-15). They knocked on the door. When defendant responded, they identified themselves and asked if they could come in. The defendant invited the officers in and they all entered the living room of defendant's home. Shortly thereafter, the defendant sat down on the davenport, invited the officers to sit, but they continued to stand. The evidence reflects that the officers then advised the defendant that they were there to discuss his involvement regarding the distribution of methamphetamine, that they had a federal arrest warrant, and that the Grand Jury had indicted him for conspiracy to distribute methamphetamine.

The officers specifically stated that the indictment was regarding his association with persons such as Kathy Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfaı a. The evidence is clear that at that point, Mr. Fellers began offering information regarding personal problems which he had during which he admitted he had been using methamphetamine at the time period he associated with these individuals. Other than the foregoing statements by the officers, no further questions were directed at defendant, nor were any specific questions asked of him regarding his use or distribution of methamphetamine. Subsequently, after about fifteen minutes in the defendant's home, the officers took Mr. Fellers into custody and to the Lancaster County jail where he was booked. The officers testified that after he was booked, they, using a written form, advised him of his rights as required by *Miranda*. They asked each question individually, asking Mr. Fellers to respond either "yes" or "no" to each question. At the conclusion of the reading and advising him of his rights, the defendant and the two officers signed the waiver of *Miranda* rights form (Exhibit No. 1). (See Transcript (Filing No. 21, pp. 16-19)). He thereafter voluntarily gave a statement.

The Court believes that the facts of this case fall squarely within the Supreme Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985). In the *Elstad* case, the evidence reflected that the officer had an arrest warrant for Mr. Elstad. When he arrived at the Elstad residence, he sat down with the defendant and asked defendant if he was aware of why he and another detective were there to talk to him. The defendant replied: "No." The officer then asked him if he knew a person by the name of Gross, and the defendant responded: "Yes." The defendant further stated he had heard there was a robbery at the Gross house. At that point, the officer said to Mr. Elstad that he felt that Mr. Elstad was involved in that, and Elstad looked up at the officer and replied: "Yes, I was there." Subsequently, Elstad was escorted to the patrol car, taken to the Sheriffs office and booked. He was then given his *Miranda* warnings, which he indicated he understood,

and having those rights in mind, he indicated he wished to speak with the officers.

The trial court let in defendant's written confession. However, the Oregon Court of Appeals reversed the conviction, and the Oregon Supreme Court refused to review. The Oregon Court of Appeals held that the failure to give the defendant his *Miranda* warnings at his home tainted his subsequent written confession, and accordingly, the Court should have suppressed the use of that confession as evidence. The United States Supreme Court reversed. The Supreme Court noted that the Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. The Court went on to note that it would be an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, "unaccompanied by any actual coercion or other circumstances, calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process" that a subsequent voluntary and informed waiver is ineffective. The Court then noted:

> Though *Miranda* requires the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

*Supra*, at p. 309. The Supreme Court further noted:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

*Id.* at 314. The Court concluded:

> We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by importing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

*Id.* at 318. In this case, the defendant made a statement at the police station after having been advised of his *Miranda* rights, and the evidence establishes that he made a knowing, intelligent, and voluntary waiver of his *Miranda* rights when he gave his statement to the police. The Court finds the unwarned statements of the defendant made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings. The Court will adopt the magistrate judge's findings as they related to the unwarned statements made by defendant at his home but rejects the findings as they relate to the subsequent statement made after he received the *Miranda* warnings.

The Court has reviewed the defendant's objections and finds the foregoing discussion resolves those objections, and they will be denied. The Court will adopt in part and reject in part the magistrate judge's report and recommendation. Accordingly,

IT IS ORDERED:

1) The report and recommendation of the magistrate judge is adopted and rejected in accordance with this memorandum opinion.

2) The unwarned statements made by the defendant at his home prior to his being taken to the Lancaster County Sheriffs Office are suppressed.

3) The statements of the defendant given at the police station after he had received his *Miranda* warnings are admissible.

DATED this 8th day of June, 2000.

BY THE COURT:
/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

JOHN J. FELLERS,
*Defendant.*

No. 4:00CR3014
(Filed Apr. 20, 2000)

**ORDER**

A hearing on the defendants motion to suppress was held before me this date. At the commencement of the hearing the defendant withdrew that portion of the motion concerning the shotguns and rifles in his residence, the government conceding that they would not be used by the government in this case. The hearing proceeded on the remainder of the motion, pertaining to defendant's statements.

At the conclusion of the hearing I read into the record my findings and recommendation. For the reasons stated from the bench at the conclusion of the hearing,

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Lyle E. Strom, United States Senior District Judge, pursuant to 28 U.S.C. 636(b)(1)(B), that the motion to suppress, filing 13, be GRANTED in the respects noted in my comments on the record, and DENIED in all other respects.

FURTHER, IT HEREBY IS ORDERED:

1. This report and recommendation shall be deemed to be filed at the time the transcript of the hearing is filed with the clerk.

2. When the transcript of this hearing is filed, the clerk shall immediately notify the attorneys for the parties.

3. The parties are notified that any failure to file an objection to this report and recommendation within the time permitted by the local rules may be deemed a waiver of the right to appeal the trial judge's adoption of this report and recommendation.

4. That portion of the motion to suppress, filing 13, which addresses firearms found at the defendant's residence, is deemed withdrawn.

Dated April 20, 2000.

BY THE COURT:
/s/ David L. Piester
United States Magistrate
Judge

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

JOHN J. FELLERS,
*Defendant.*

No. 4:00CR3014
(Filed May 2, 2000)

**HEARING ON DEFENDANT'S MOTION TO SUPRESS**

Hearing held before the HONORABLE DAVID L. PIESTER, United States Magistrate Judge, on April 20, 2000 in Lincoln, Nebraska.

* * * *

**[102]** . . . THE COURT: Well, the principal issues before the Court in regard to the motion to suppress are, first of all, whether or not the defendant was in custody at the time of the statements made in his home at the time of his visit by Detective Garnett and Deputy Bliemeister.

The factors that I have to consider in determining whether or not the defendant was in custody at that time are stated in *United States v. Griffin*, 922 F 2nd 1343, which is an Eighth Circuit case in 1990. The first one is whether the suspect was informed at the time of questioning that the questioning was voluntary, that the subject – suspect was free to leave or request the officers to do so or that the suspect was not considered under arrest. Obviously, that's not applicable here.

Second, whether the suspect possessed unrestrained freedom of movement during questioning and Deputy Blie-

meister said that he was not free to move around. And that was confirmed by Detective Garnett.

Whether the suspected – excuse me, whether the suspect initiated contact with authorities. He did not. Or voluntarily acquiesced to official requests to respond to questions. The request was an official request to talk. It wasn't to respond to questions explicitly. But implicitly, it was.

**[103]** Whether strong arm tactics or deceptive stratagems were employed during the questioning, I do not see that there was any strong arm tactic involved at all; however, the use of detective stratagems is another matter. There were no deceptions as such, but when the officers arrived, Detective Bliemeister said that the purpose of their visit was to discuss with the defendant his role in methamphetamine use and distribution. That was not a true statement. Their purpose was to arrest him. In addition, Detective Garnett stated we need to talk with you about your involvement in methamphetamine use or distribution. Again, while that's not altogether untrue, it does not reflect truthfully the purpose of their visit.

The next factor is whether the atmosphere of the questioning was police dominated, and I find that it was police dominated. They had, at that time, arrested him. I find specifically that Deputy Bliemeister did advise him that either he was arrested or they had a warrant for his arrest in the course of his initial contact and comment to the defendant.

The last factor is whether the suspect was placed under arrest at the termination of the questioning. Obviously, he was arrested before that.

One other thing: With regard to the arrest, **[104]** there was a notable lack of testimony that at the conclusion of their conversation the officers arrested the defendant. Both of them testified that the comment that was made was simply we need to go now, John, and take you to the jail. If they had not previously advised him that he was under arrest or if it were not clear that he was under arrest, then they would have had to have explained that statement and to ex-

plicitly arrest him at that time. There was no testimony that they did.

I therefore find that he was under arrest at the time of all of the statements made. He was definitely in custody under the considerations of *Griffin*.

The next question is whether or not he was interrogated. The applicable test is from *Rhode Island v. Innis* (ph). And, as stated by Mr. Brennan, it is whether or not the comment made was designed to elicit a response. I find that it was. First of all, it is telling, I think, that the first statement made was, we need to talk with you – or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a **[105]** response.

In addition, it was, again, as Mr. Brennan mentioned, unnecessary for him to say what the indictment was all about specifically mentioning individuals which incident – who incidently [sic] are not mentioned in the indictment. I cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

The next question is since he was not Mirandized and since he was interrogated while he was in custody, how much needs to be suppressed. The defendant states that everything involved in the – in the comments made by the defendant should be suppressed, even those subjects which were repeated at the jail. I must decide whether or not the subjects that were first broached at the home and later discussed in detail at the jail – I guess the issue is whether or not there was something in between to attenuate the primary taint, as the clause goes. There was no evidence in that regard, directly. There was evidence that they took him immediately to the jail; he was booked in. I think I can take judicial notice of the fact that wherever this address is in Lincoln, Nebraska, it's probably no more than 20 minutes

away from the jail. So I think that its fair to **[106]** conclude that this conversation took place approximately a half hour after the officers and the defendant left his home.

He was Mirandized at this time and I also find that he voluntarily agreed to talk with the officers at that time.

Obviously, the subjects that were mentioned for the first time at the jail and the defendant's comments regarding those subjects need not be suppressed. My notes indicate that the individuals Ernie Lawrence, Valerie Green, Leon Thompson, Shelly Farfalla were first mentioned at the jail. Also the subject of the defendant's involvement in distribution of methamphetamine was first mentioned at the jail. And also the subject of the defendant fronting money for the purchase of methamphetamine was mentioned first at the jail.

With respect to the individuals that were mentioned and the fact that by answering, the defendant acknowledged that he knew those individuals and by stating that at that period of time, he was having personal problems and was using meth, thereby incriminating him and connecting the meth with the individuals, that must be suppressed. And I shall recommend that all of the comments made by the defendant **[107]** at the home be suppressed as well as any comments regarding those specific individuals elicited at the time of the interview in the jail be suppressed. That would be the three individuals: Kathi Kuenning, Pat Sardeson and Thomas Geffs, otherwise known as Slick.

There's no information by which I can find that the primary taint of the initial interrogation by the officers was removed by any time or any other activity between the time of the initial statement – interrogation and statement and the time of the subsequent interview in the jail.

Therefore, it will be recommended – is recommended to the trial judge pursuant to 28 USC 636b(1)(b) that the motion to suppress be granted in these respects and denied in all other respects. I shall order that at the time the transcript of this hearing is filed that will be deemed the filing of the report and recommendation. I will direct the clerk to

notify counsel of that filing and at that time we'll commence the ten-day limitation for filing objections. Either side or both sides may file objections. After they have been responded to, the matter will go before the trial judge for a decision.

Is there anything else that we should address regarding this case today?

[108] MS. LIPOVSKY: Is this – no.

THE COURT: All right.

MR. BRENNAN: I'm sorry. Did you mention the name Mark Farfalla in – you said three names, and there were actually four names that were mentioned, by Bliemeister at the home and the fourth name was Mark Farfalla.

THE COURT: Let me check my notes on that. I did not write that – that name down as I was taking notes. If, in the transcript, that name is mentioned as having been mentioned at the home for the first time, then my recommendation would include that name as one of the subjects to be suppressed. All right.

If there's nothing else, we'll be in recess.

MR. BRENNAN: Thank you.

(end of proceedings)

* * * *

[109] TRANSCRIBER'S CERTIFICATE

I hereby certify that the previous pages reflect truly, accurately and completely the recording of this proceeding as transcribed by me to the best of my ability.

In testimony whereof, I have hereunto set my hand this 29th day of April, 2000.

/s/ Karen Mason
Transcriber – Karen Mason

Supreme Court, U.S.
FILED
SEP 8 - 2005
OFFICE OF THE CLERK

No. 04-1552

# In the Supreme Court of the United States

JOHN J. FELLERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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*Counsel of Record*
ALICE S. FISHER
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## QUESTION PRESENTED

1. Whether statements that petitioner made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed under the Sixth Amendment as the fruits of earlier unwarned and uncounseled post-indictment questioning.

2. Whether the court of appeals erred by concluding that any error in the admission of petitioner's statements was harmless beyond a reasonable doubt.

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# In the Supreme Court of the United States

No. 04-1552

JOHN J. FELLERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 397 F.3d 1090. A prior opinion of the court of appeals (Pet. App. 23a-30a) is reported at 285 F.3d 721. The order of the district court (Pet. App. 31a-36a) and the report and recommendation of the magistrate judge (Pet. App. 37a-38a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. The petition for a writ of certiorari was filed on May 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months of imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. 23a-30a. This Court reversed and remanded. *Id.* at 17a-22a. On remand, the court of appeals again affirmed petitioner's conviction, but remanded his case for resentencing in accordance with *United States* v. *Booker*, 125 S. Ct. 738 (2005). Pet. App. 1a-15a.[1]

1. On February 24, 2000, after a federal grand jury indicted petitioner for conspiring to distribute and possess with intent to distribute methamphetamine, two police officers went to petitioner's home in Lincoln, Nebraska, to arrest him. One of the officers told petitioner that he was there to discuss petitioner's involvement in methamphetamine distribution. The officer told petitioner that he had a federal warrant for petitioner's arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine with "persons such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, and Mark Farfalla." Pet. App. 33a; *id.* at 18a. As petitioner sat on his sofa sipping from a mug, see *id.* at 32a; Suppression Hearing Tr. 11, 43-44, petitioner implicitly acknowledged that he knew the four people the officers named by indicating that at the time he had associated with them, he had been going through a variety of finan-

[1] On May 2, 2005, the district court sentenced petitioner to a term of 102 months of imprisonment. Pet. 11 n.*.

cial and personal problems, among them methamphetamine use. He did not, however, link them with drug distribution. See Pet. App. 33a; see also *id.* at 18a; Suppression Hearing Tr. 84. The officers then arrested petitioner and transported him to the county jail. Pet. App. 1a, 18a. During the approximately 20-minute ride, the officers asked petitioner no questions. See *id.* at 33a, 41a.

At the jail, the officers advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his rights and signed a written waiver-of-rights form. Petitioner then explicitly acknowledged that he knew Kuenning, Sardeson, Geffs, and Farfalla, admitted that he also had associated with other individuals whom he had not previously identified (Val Green, Leon Thompson and Ernie Lawrence), and said that he had purchased methamphetamine from Kuenning and Sardeson for personal use. See Pet. App. 2a, 42a. Petitioner also admitted that he had loaned money to Kuenning, even though he suspected that the money might have been used for drug transactions. See *id.* at 2a, 18a. Petitioner repeatedly denied that he had ever sold methamphetamine and denied that he had purchased methamphetamine from Sardeson or Kuenning in quantities sufficient for resale. See *ibid.*

2. Before trial, petitioner moved to suppress both the statements he had made at his home, in the absence of *Miranda* warnings, and his subsequent statements made at the jail. The district court granted the suppression motion as to the statements that petitioner made at his home, adopting the findings of the magistrate judge that petitioner was in custody at the time of the statements at his home and that the statements were made in

response to remarks of the officers which were "implicitly questions." Pet. App. 31a; see *id.* at 32a, 35a. The district court declined, however, to suppress petitioner's subsequent statements at the jail. The court reasoned that because petitioner voluntarily made the jailhouse statements after waiving his *Miranda* rights, those statements were admissible under *Oregon* v. *Elstad*, 470 U.S. 298 (1985), which held that, although *Miranda* requires that an unwarned statement be suppressed, the admissibility of any subsequent statement made after administration of warnings turns solely on whether it is knowingly and voluntarily made. Pet. App. 33a-35a (citing *Elstad*, 470 U.S. at 309). The district court concluded that "the unwarned statements of [petitioner] made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings." *Id.* at 35a.

Statements from petitioner's jailhouse interview were admitted into evidence at trial, along with testimony from seven cooperating witnesses who testified about methamphetamine transactions involving petitioner. See Pet. App. 13a; Gov't Supp. C.A. Br. 16-19. The jury found petitioner guilty of conspiring to possess and distribute methamphetamine. Pet. App. 2a.

3. The court of appeals affirmed. Pet. App. 23a-30a. Petitioner contended that the statements at his home were obtained in violation of his Sixth Amendment right to counsel under *Patterson* v. *Illinois*, 487 U.S. 285 (1988), and that his jailhouse statements should have been suppressed as fruits of the Sixth Amendment violation. The court rejected that claim, finding *Patterson* "not applicable" because "the officers did not interrogate [petitioner] at his home." Pet. App. 26a. The court also concluded that petitioner's jailhouse statements

were properly admitted under *Elstad*. The court found that the record "amply support[ed]" the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. *Id.* at 25a-26a. In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers violated petitioner's Sixth Amendment rights by "deliberately eliciting" incriminating information from him without counsel present, but that the jailhouse statements were admissible under the rationale of *Elstad*. *Id.* at 30a.

4. This Court reversed, holding that the officers "deliberately elicited" the statements that petitioner made at his home in violation of "the Sixth Amendment standards established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)] and its progeny." Pet. App. 21a. The Court stated that the court of appeals had erred in holding that the absence of "interrogation" foreclosed petitioner's Sixth Amendment claim that the jailhouse statements should have been suppressed as fruits of the statements taken from petitioner at his home, because the proper Sixth Amendment test turns on deliberate elicitation, which is not the same as interrogation. *Ibid.* The Court remanded for the court of appeals to determine whether petitioner's jailhouse statements should be suppressed as fruits of the earlier statement and to address "whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." *Id.* at 21a-22a.

5. On remand, the court of appeals again affirmed petitioner's conviction. Pet. App. 1a-15a. The court held that the rationale in *Elstad* applies in the Sixth Amend-

ment context, reasoning that "[b]oth the deterrence of future Sixth Amendment violations and the vindication of the Amendment's right-to-counsel guarantee have been effectuated through the exclusion of [petitioner's] initial statements." *Id.* at 7a. "In the case of warned confessions that follow unwarned, uncounseled statements," the court stated, "the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements (which have already been suppressed) and the subsequent statements." *Id.* at 8a. The court noted the "similarities between the Sixth Amendment context at issue in [petitioner's] case and the Fifth Amendment context at issue in *Elstad*," explaining that "there is no significant difference between a lawyer's usefulness to a suspect during pre-indictment custodial interrogation and his usefulness at post-indictment questioning." *Id.* at 8a-9a (citing *Patterson*, 487 U.S. at 298-299).[2]

The court also held that even if petitioner's jailhouse statements should have been suppressed, "any error in

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[2] The court also concluded, based on a "multi-factor test derived from" the plurality opinion in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), that "the officers' conduct in this case did not vitiate the effectiveness of the *Miranda* warnings given to [petitioner]." Pet. App. 11a. The court emphasized that in this case and unlike in *Seibert*, the statements were separated in time, took place "in a new and distinct setting," and the subject of the statements overlapped only "to a small degree with his initial unwarned * * * admissions." *Ibid.* In addition, the court found "no evidence that the officers in this case employed * * * a deliberate strategy" to obtain incriminating statements in violation of *Miranda*, and therefore concluded that "the concerns voiced by Justice Kennedy" in his concurring opinion in *Seibert* were not implicated. *Id.* at 12a (citing *Seibert*, 124 S. Ct. at 2614 (Kennedy, J., concurring in the judgment)).

admitting those statements at trial was harmless beyond a reasonable doubt." Pet. App. 12a. The court found that petitioner's admissions that he knew some of the co-conspirators and had used methamphetamine with them "were either corroborated by other government witnesses or were immaterial to the case." *Id.* at 13a. In addition, the court reasoned, the testimony of those witnesses "went largely unchallenged." *Ibid.* The court also noted that petitioner used his statements to the police to his advantage at trial by emphasizing his "vehement[] deni[al] [of] selling or distributing methamphetamine" during his jailhouse statement and arguing it was proof of his innocence "because a police officer who was trained to elicit the truth from suspects could not elicit an admission of distribution from [petitioner]." *Ibid.* Accordingly, the court concluded, "the introduction of [petitioner's] jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute." *Ibid.* Finally, the court noted that in addition to petitioner's statements, the government presented eight witnesses who testified about petitioner's possession and distribution of methamphetamine. Although the individual witnesses' credibility could be questioned because of their plea bargains, criminal histories, and drug use, the court concluded that the government's evidence proved that petitioner "conspired to possess methamphetamine with intent to distribute." *Id.* at 13a-14a.

## ARGUMENT

Petitioner contends that his jailhouse statements should have been suppressed as the fruits of an earlier violation of Sixth Amendment standards and that the

court of appeals erroneously relied on *Oregon* v. *Elstad*, 470 U.S. 298 (1988), in holding otherwise. The court of appeals' decision rejecting petitioner's claim is correct and does not conflict with any decision of this Court or of any other court of appeals; indeed, the United States is unaware of any other court of appeals decision that even has addressed whether the rationale of *Elstad* applies in the Sixth Amendment context, cf. Pet. 14. Even if *Elstad* did not apply, petitioner still could not establish that his statements should be suppressed as fruits. And, finally, as the court of appeals concluded, any error in the admission of petitioner's jailhouse statements was harmless beyond a reasonable doubt. For all of those reasons, further review is not warranted.

1. Petitioner contends (Pet. 11-23) that this Court should grant review to make clear that the rationale of *Oregon* v. *Elstad*, *supra*, does not apply in the Sixth Amendment context, and that instead, the broad derivative-evidence exclusion developed for completed Fourth Amendment violations should be applied under such circumstances. That claim lacks merit.

a. In *Oregon* v. *Elstad*, this Court rejected the claim under the Fifth Amendment that a suspect's giving of an initial voluntary statement without *Miranda* warnings tainted his later voluntary statement made after he received warnings and waived his rights. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, this Court concluded that, "absent deliberately coercive or improper tactics in obtaining the initial statement," a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the

earlier statement." 470 U.S. at 314. The Court explained that, in the absence of police coercion, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318.

As the court of appeals concluded, the rationale of *Elstad* is equally applicable in this context. In *Elstad*, the Court reasoned that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to ~~make a~~ statement to the authorities." 470 U.S. at 308. The same is true with respect to an indicted defendant's decision whether to deal with questioning by the police "with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988). Because the assistance of counsel serves a similar role during pretrial questioning by the police regardless of whether the right to counsel arises under the Fifth or Sixth Amendment, this Court has held that advising an accused of his *Miranda* rights is generally sufficient to permit a knowing and intelligent waiver of the Sixth Amendment right to counsel during police questioning. *Id.* at 298-299 & n.12. The *Miranda* warnings convey to the accused at the time of questioning "the sum and substance of the rights that the Sixth Amendment provide[s]." *Id.* at 293. The warnings thus "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." *Id.* at 294. Once an indicted defendant has received that information through *Miranda* warnings, it neutralizes the earlier police error

in conducting unwarned questioning and can render the later statement admissible.

b. Petitioner contends (Pet. 16-19) that the rationale of *Elstad* is inapplicable here because counsel serves a different role in the Sixth Amendment context: "the assistance of counsel ensures 'equality in [the] adversary confrontation' by protecting the accused from his own 'lack of familiarity with the law,'" and by "advis[ing] the defendant whether it is in his best interest, in light of the charges against him, to speak or remain silent." Pet. 19 (quoting *United States* v. *Ash*, 413 U.S. 300, 317 (1973)). Also, petitioner claims (*ibid.*), counsel serves a "broader Sixth Amendment interest in those circumstances where government officers have previously * * * elicited incriminating information from a defendant," because counsel could "inform the defendant * * * of the legal rules concerning the admissibility of the prior * * * statement." Pet. 17. But as the Court held in *Patterson*, the *Miranda* rights "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." 487 U.S. at 294. Even if the warnings themselves do not provide all the legal advice an attorney could, they equip a suspect to make the decision whether to speak with police immediately without the assistance of counsel, or to wait for counsel to advise him on those matters before again speaking to police. See *id.* at 291.

c. Petitioner also contends (Pet. 14-16) that the rationale of *Elstad* is premised on the fact that unwarned interrogation is only a violation of the prophylactic *Miranda* rule rather than the Fifth Amendment itself. He therefore argues that it does not apply here because the deliberate elicitation of a response from an accused constitutes a completed violation of the Sixth Amend-

ment. The Court's opinion in this case pointedly avoided stating that the officers' deliberate elicitation at petitioner's home violated the Sixth Amendment, instead stating only that their actions "violate[d] the Sixth Amendment *standards* established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)] * * * and its progeny." Pet. App. 21a (emphasis added); *id.* at 22a (discussing "police questioning in violation of Sixth Amendment *standards*") (emphasis added). See generally *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting) ("It is * * * the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim."); accord *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977).

But even if there were a completed Sixth Amendment violation at the time of unwarned questioning, *Elstad*'s rationale would still apply in this context. There is no question that this Court has recognized a limited "fruits" doctrine as applied to certain forms of derivative evidence after the denial of counsel at a critical stage in the prosecution. See *United States* v. *Wade*, 388 U.S. 218 (1967); *Nix* v. *Williams*, 467 U.S. 431 (1984). As discussed below, however, neither case involved the accused's own subsequent statements. When such statements *are* involved, the critical factor in determining whether "fruits" analysis applies is that the infringement of Sixth Amendment standards in conducting unwarned deliberate elicitation is closely analogous to the omission of *Miranda* warnings in *Elstad*. In both cases, there is a failure to ensure that the suspect could make an intelligent choice whether to waive his rights—and in both cases, the provision of that information breaks any link to the antecedent unwarned questioning.

Relying on *Wade* and *Nix*, petitioner contends (Pet. 12-13) that this Court has already held that "the traditional derivative-evidence rule" in the case of Fourth Amendment violations applies in determining whether a defendant's voluntary, warned statement is the fruit of a prior Sixth Amendment violation. Those cases—both of which predate *Elstad*—do not govern this context. In *Wade*, the Court only held that a post-indictment lineup was a critical stage under the Sixth Amendment and remanded for the lower courts to determine whether a witness's in-court identification of the defendant was tainted by an earlier post-indictment lineup conducted without the presence of counsel. 388 U.S. at 239-243. The Court's remedy directly protected the adversary process at trial, by requiring examination of whether the later in-court identification was the product of the earlier denial of counsel. In *Nix*, the Court rejected a defendant's claim that physical evidence (of the location and condition of a murder victim's body) should not have been admitted at his trial because it was the fruit of officers' earlier elicitation of incriminating statements, in violation of his right to counsel. The Court noted that it had applied the "fruit of the poisonous tree" doctrine to Sixth Amendment violations, 467 U.S. at 442 (citing *Wade*), but held that the evidence was properly admitted under the inevitable-discovery exception to the exclusionary rule because the victim's body would inevitably have been discovered. *Id.* at 440-450.

In this case, unlike *Wade* and *Nix*, the evidence claimed to be the fruit of a prior Sixth Amendment violation is a second statement voluntarily made by a defendant after receiving *Miranda* warnings and knowingly and intelligently waiving his right to counsel. In this situation, the defendant's decision to speak to the offi-

cers without counsel is an independent act of free will that breaks the causal link to the prior illegality. *Elstad* thus supplies the appropriate framework for analysis and ensures that a proper balance is struck between protecting the defendant's right to counsel and honoring his free choice to waive it.[3]

This does not, as petitioner contends, make *Miranda* warnings a "cure-all" (Pet. 22) or "provide[] the police with a road map to eviscerate the right[s] of criminal defendants," Pet. 11. The argument that police might find in the decision below a "road map" to secure admissible statements by deliberately violating Sixth Amendment standards ignores this Court's analysis in *Missouri* v. *Seibert*, 124 U.S. 2601 (2004), which suggests that a later set of *Miranda* warnings would not be effective if officers had purposely conducted unwarned questioning to undermine later warnings. *Id.* at 2610-2613 (plurality opinion) (requiring objectively effective warnings and distinguishing *Elstad*); *id.* at 2614-2616 (Kennedy, J., concurring in the judgment) (curative measures required, beyond those in *Elstad*, when officers deliberately use a two-step technique to undermine *Miranda* warnings).[4]

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[3] *United States* v. *Patane*, 124 S. Ct. 2620 (2004), which petitioner also cites (Pet. 13), is even less helpful to him. *Patane* did not involve a Sixth Amendment violation at all, and the plurality opinion merely cited *Nix* in passing as "discussing the exclusionary rule in the Sixth Amendment context and noting that it applies to 'illegally obtained evidence [and] other incriminating evidence derived from [it].'" 124 S. Ct. at 2629 (quoting *Nix*, 467 U.S. at 441).

[4] As the court of appeals held (Pet. App. 12a), there is nothing in the record here to suggest that the officers employed a deliberate strategy to undermine the effectiveness of the later warnings. See n.2, *supra*; cf. *Seibert*, 124 S. Ct. at 2612 n.6 (plurality opinion).

Petitioner also errs in claiming (Pet. 23) that extending the *Elstad* rationale to the Sixth Amendment context would mean that "nothing at all is changed by the fact that the government has violated" Sixth Amendment standards. A later set of warnings does nothing to permit the admission of the initial unwarned and uncounseled statement. And when the defendant gives a second statement after knowingly and intelligently waiving counsel, the government must still establish that the waiver of rights was voluntary. *Patterson*, 487 U.S. at 292 n.4. Badgering or misleading conduct by authorities may preclude such a showing. *Harvey*, 494 U.S. at 353-354. Where investigators obtain the unwarned initial statement through coercion or the application of excessive psychological pressure, the defendant may not be able to make a knowing and voluntary decision to speak because the "continuing effect of the coercive practices" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944)) may carry over to the second encounter despite the warnings. Cf. *Elstad*, 470 U.S. at 310 (requiring a break in the chain of events "[w]hen a prior statement is actually coerced"). There is therefore no need to apply a broad fruits doctrine in this context to deter police misconduct.

2. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals. Indeed, no other court of appeals has squarely addressed whether *Elstad*'s rationale applies to the admissibility of statements made by an indicted defendant who, after police "deliberately elicit" statements from him without first informing him of his rights, see *Massiah*, 377 U.S. at 206, is then informed of his *Miranda* rights, voluntarily waives them, and makes further statements. The court of appeals decisions peti-

tioner cites (Pet. 13) are inapposite.[5] The absence of any "conflict of decision in the federal system" on this issue strongly counsels in favor of "the issue receiv[ing] further study" in the courts of appeals "before it is addressed by this Court." *McCray* v. *New York*, 461 U.S. 961, 962-963 (1983) (Stevens, J., respecting the denial of certiorari).

3. This Court's review is particularly unwarranted because petitioner's jailhouse statements would not be subject to suppression even under the fruits analysis

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[5] None of those cases involved the question whether a defendant's second statement, voluntarily made after receiving *Miranda* warnings, should be suppressed as the fruit of prior improper questioning. See *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1112-1117 (11th Cir. 1990) (applying "fruit of the poisonous tree" doctrine to testimony of other witnesses derived from Sixth Amendment violation); *United States* v. *Kimball*, 884 F.2d 1274, 1278-1279 (9th Cir. 1989) (affirming suppression of co-conspirator statements that were fruits of Sixth Amendment violation). The other cases either involve no Sixth Amendment issue, see *United States* v. *Faulkingham*, 295 F.3d 85, 94 (1st Cir. 2002) (need for deterrence did not warrant suppression of fruits of negligent violation of defendant's *Miranda* rights), cert. denied, 124 S. Ct. 2931 (2004); *United States* v. *Tedford*, 875 F.2d 446, 450-451 (5th Cir. 1989) ("fruit of the poisonous tree" doctrine does not apply to violations of Fed. R. Crim. P. 41(e)), or involved the separate question of whether statements elicited in violation of Sixth Amendment standards with respect to pending charges are admissible at the defendant's trial on "very closely related subsequent charges." And one decision, *United States* v. *Mitchell-ree*, 940 F.2d 1329, 1339-1345 (10th Cir. 1991) (admission of recorded conversation between defendant and informant required reversal of defendant's conviction for witness tampering, even though defendant had not been indicted on that charge when recording was made), rests on a Sixth Amendment premise that is no longer good law. See *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001) (when Sixth Amendment right to counsel attaches, it encompasses only those offenses that "would be considered the same offense under the *Blockburger* [v. *United States*, 284 U.S. 299 (1932),] test").

that he advocates. In the Fourth Amendment context, to determine whether a subsequent statement was sufficiently independent to dissipate the taint of the illegal search or seizure, the Court has examined the "temporal proximity" of the constitutional violation to the discovery of the derivative evidence in question, "the presence of intervening circumstances, and * * * the purpose and flagrancy of the official misconduct," to determine whether the confession was "an act of free will [sufficient] to purge the primary taint." *Kaupp* v. *Texas*, 538 U.S. 626, 632, 633 (2003) (per curiam) (quoting *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), and *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)). Under that standard, petitioner's jailhouse statement was not the fruit either of police misconduct or of his earlier statement, but was an independent and informed act of free will.

Although petitioner emphasizes (Pet. 21) that "only a half-hour" passed between petitioner's statement at his house and his interview at the jail, this Court has made clear that "relatively short" periods are sufficient to dispel the taint of illegality if, as here, the encounter with police was not "under the strictest of custodial conditions." *Rawlings* v. *Kentucky*, 448 U.S. 98, 107, 108 (1980) ("relatively short" 45-minute period between illegal detention and warned statement was sufficient to purge taint where suspects were detained "quietly in the living room" and police were courteous). Moreover, the officers' brief statement to petitioner at his house that they had come to discuss his involvement in distribution of methamphetamine and his association with co-conspirators did not "rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion" of petitioner's subsequent statements. *Id.* at 110. Nothing

the officers did at petitioner's house could have influenced petitioner's later decision, after receiving *Miranda* warnings, to waive counsel and answer questions. The officers, who were dressed in plain clothes and were not carrying weapons visibly, Suppression Hearing Tr. 8, 62, 66, did not offer petitioner any promises or inducements, did not apply any pressure, and did not even seek to persuade him of the wisdom of cooperating. In contrast to the cases on which petitioner relies (Pet. 19-22), nothing about the police conduct here suggests that the officers intended to overpower the defendant's will to resist. See *Kaupp*, 538 U.S. at 631-632 (warrantless arrest of a minor at 3 a.m., followed by his "removal from [the] house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene"); *Brown*, 422 U.S. at 605 (defendant arrested at gunpoint without probable cause, ordered to stand against wall, and subjected to search that was apparently "calculated to cause surprise, fright, and confusion").

In addition, as the court of appeals found, see Pet. App. 11a-12a, it is clear that the officers in this case made no effort to exploit petitioner's initial statement in order to obtain the second. There is no indication that the officers even mentioned the first statement to petitioner during the jailhouse interview, or reminded him of particular statements he had made, let alone attempted to convince petitioner that he had nothing more to lose by providing a full account of his actions. *Id.* at 7a, 11a. To the contrary, the officers gave petitioner full *Miranda* warnings, informing him that he did not have to speak with the officers without counsel present, and confirmed that he understood the warning. And the second statement did not merely repeat the minimal acknowledgment in his initial statement that he knew the

persons mentioned in the indictment and used methamphetamine in the past (without linking the two, see Pet. App. 33a; see also *id.* at 18a; Suppression Hearing Tr. 84). Rather, it covered new subjects that petitioner could not have believed he had already revealed to police, such as that he had bought drugs from some of the persons named by the officers, had loaned money to Kuenning that he suspected she had used for drugs, and knew other persons not named in the indictment. See Pet. App. 11a (second statement overlapped only "to a small degree with his initial unwarned * * * admissions"). Petitioner's valid waiver of his right to counsel makes it unlikely that petitioner was induced to speak by the knowledge that he had already made a statement to the officers. See *Rawlings*, 448 U.S. at 107 (fact that defendant "received *Miranda* warnings only moments before he made his incriminating statements" is "important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of" a constitutional violation). Based on all of the relevant factors, petitioner's decision to speak with the officers at the jailhouse was "sufficiently an act of free will to purge the primary taint" of the Sixth Amendment violation. *Wong Sun*, 371 U.S. at 486.

4. Review also is not warranted in this case because the court of appeals correctly ruled that any error in the admission of petitioner's jailhouse statement was harmless beyond a reasonable doubt. Like other constitutional errors, Sixth Amendment violations are harmless when it "appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder* v. *United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)); see *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972)

(*Massiah* violation harmless where "[t]he jury * * * was presented with overwhelming evidence of [the defendant's] guilt").

a. As the court of appeals noted (Pet. App. 13a), in addition to petitioner's statements to police, at trial "the government presented eight witnesses who detailed the extent of the conspiracy as well as [petitioner's] involvement in both possession and distribution of methamphetamine"). Petitioner's admissions during the jailhouse interview that he was acquainted with the other conspirators named in the indictment, that he had purchased small quantities of methamphetamine from individuals the officers identified, and that he had loaned money to Kuenning to pay her bills were largely, if not entirely, cumulative of the other witnesses' testimony, which, as the court of appeals noted, "went largely unchallenged." *Ibid.*; Gov't Supp. C.A. Br. 16-19. Petitioner contends that the admission of his jailhouse statements could not have been harmless because it corroborated the testimony of the seven cooperating witnesses, who, he claims, had "severe credibility problems." Pet. 25. But that overlooks the fact that the cooperating witnesses corroborated each other's testimony in important respects. See, *e.g.*, *United States* v. *Salimonu*, 182 F.3d 63, 71-72 (1st Cir. 1999) (concluding that error in admitting evidence was harmless beyond a reasonable doubt, emphasizing that "[t]he fact that the three co-conspirators' testimony was detailed and basically consistent * * * was substantial evidence of guilt"); *United States* v. *Valley*, 928 F.2d 130, 135 (5th Cir. 1991) (in determining that error was harmless beyond a reasonable doubt, noting that testimony of co-conspirators "was consistent and highly detailed"). For example, Kuenning, Geffs, and Sardeson each testified about a trip Kuenning and

Geffs made to Grand Island, Nebraska, to buy methamphetamine, and both Sardeson and Geffs confirmed that petitioner had supplied them with $1000 to purchase methamphetamine. See Trial Tr. 197-202, 316-322, 327, 382-386. Both Cotton and Kuenning (who also was called as a defense witness) testified that they went together to Tommy Gonzales to purchase methamphetamine, some of which they then supplied to petitioner. *Id.* at 248-252, 530-531, 537-563. Kuenning and Ernest Lawrence both testified that they traveled to Colorado together to buy methamphetamine and that they stopped by petitioner's house before they left and he gave them money, although their accounts of what Kuenning and petitioner said at his house differed. *Id.* at 237-241, 287-288, 497-506. Their testimony also was corroborated by physical evidence (for example, telephone records and personal address books, see *id.* at 140-145, 224).

Moreover, as the court of appeals noted (Pet. App. 13a), the jailhouse statements supported petitioner's defense theory—*i.e.*, that he was a methamphetamine user but was not involved in distributing the drug—and petitioner's counsel himself relied on the statements in his closing argument, noting that petitioner had steadfastly denied selling methamphetamine, despite being questioned repeatedly by a skilled interviewer who had been trained in interrogation techniques. See *ibid.*; Gov't Supp. C.A. Br. 19-20. Thus, as the court of appeals correctly concluded, "the introduction of [petitioner's] jailhouse admissions at worst had no effect on the verdict and at best militated against a conviction for conspiracy to possess methamphetamine with intent to distribute." Pet. App. 13a. In any event, the factbound application of settled harmless-error principles does not

warrant review by this court. See *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) (noting that this Court reviews harmless-error claims "sparingly"); S. Ct. R. 10.

b. Petitioner contends (Pet. 23-25) that review is warranted because the court of appeals "did not apply the *Chapman* standard" (Pet. 23), and improperly equated harmless error review with sufficiency-of-the-evidence review. That claim is based on the court of appeals's statement in passing that "the evidence presented by the government * * * is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute," Pet. 24 (quoting Pet. App. 14a) (emphasis omitted), and on the court's citation of a sufficiency-of-the-evidence case in the course of its discussion. See *ibid.* (citing *United States* v. *Angular-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)). That claim lacks merit. Petitioner overlooks that the court recited the correct standard of review and noted that while "a defendant's own confession is 'a particularly potent piece of evidence,' its erroneous introduction is harmless where the other evidence against him is so substantial that it 'assured beyond a reasonable doubt that the jury would have returned a conviction even absent the confession.'" Pet. App. 12a (quoting *United States* v. *Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000)); accord *Hasting*, 461 U.S. at 512 (noting strength of evidence against defendant in determining whether error was harmless beyond a reasonable doubt); *Brown* v. *United States*, 411 U.S. 223, 231 (1973) ("The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence.").

In light of the court's recitation of the correct standard, the court of appeals' passing reference to "sufficien[cy]" (Pet. App. 14a) to discuss one established

factor in constitutional harmless-error analysis—the strength of the government's case—does not justify concluding that the court of appeals applied the incorrect standard. That is especially true because the Eighth Circuit (including in opinions written by the author of the decision below) repeatedly has emphasized that "sufficiency of the evidence and harmlessness of an error are different questions," *United States* v. *Kenyon*, 397 F.3d 1071, 1082 (2005), and that "sufficiency of the evidence alone is not enough to support a finding of harmless error." *United States* v. *Azure*, 801 F.2d 336, 341 (1986) (citing *United States* v. *Slader*, 791 F.2d 655, 657 n.2 (8th Cir. 1986)); see also *United States* v. *Hazelett*, 80 F.3d 280, 283 (1996) ("To say that absent certain inadmissible evidence the jury might have reached a different result is not at all the same thing as saying that without that evidence no jury could lawfully convict."); cf. *United States* v. *Ryan*, 153 F.3d 708, 712 (1998) (Wollman, J., for the court) (emphasizing that "a materiality determination [for purposes of *Brady* v. *Maryland*, 373 U.S. 83 (1963)] is not a sufficiency of evidence test"). Further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-1552

IN THE

# Supreme Court of the United States

JOHN J. FELLERS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

### I. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER *OREGON* V. *ELSTAD* CONTROLS THIS CASE

Two years ago, this Court granted review in this case to decide, among other things, whether the traditional "fruits" analysis governing evidence derived from constitutional violations is displaced by the rule of *Oregon* v. *Elstad*, 470 U.S. 298 (1985), when the primary constitutional violation is police "deliberate elicitation" of an incriminating statement from an indicted defendant, in violation of his Sixth Amendment right to the assistance of counsel. *See* Pet., No. 02-6320, Questions Presented (II), 17-23. Although the Court ultimately did not reach that issue, *see Fellers* v. *United States*, 540 U.S. 519, 525 (2004), the previous grant of certiorari demonstrates that the question is an important one that warrants resolution by this Court.

The Court's decision that petitioner's Sixth Amendment rights were violated by the police in this case, *see* 540 U.S. at 524, refutes the main theme underlying the government's brief in opposition and indeed its arguments throughout the history of this case—namely, that there is no difference between the protections offered by the Fifth and Sixth Amendments to individuals questioned by the police. *See, e.g.*, Br. in Opp. 9, 10, 14. To the contrary, the *holding* of this Court's decision in this case is that the standards for ascertaining whether evidence is obtained in violation of those commands are different, precisely because the two commands are different in substance.

The Fifth Amendment prohibits the government from coercing a statement from any suspect (whether indicted or not). Accordingly, *Miranda* v. *Arizona*, 384 U.S. 436 (1966)—which implements the Fifth Amendment guarantee—applies when the police "interrogate" a suspect in a manner that is likely to be coercive (including a custodial setting). *See Fellers*, 540 U.S. at 524. The Sixth Amendment's guarantee of the assistance of counsel, which applies only to those who have been formally "accused" in a criminal prosecution, protects the criminal defendant from more than

coercion; it serves to ensure evenhandedness in the adversarial process. "'[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability.'" *Id.* (quoting *Michigan* v. *Jackson*, 475 U.S. 625, 632 n.5 (1986)). So, as the Court made clear here, the Sixth Amendment is violated when government agents "deliberately elicit[]" an incriminating statement from an accused, even in a setting that might not amount to "interrogation" (because, for example, the setting was not custodial). *See id.; see also United States* v. *Henry*, 447 U.S. 264, 273 n.11 (1980) (noting there is no "custody" requirement in "this branch of the Sixth Amendment").

In this case, the police violated petitioner's Sixth Amendment right to counsel when they deliberately elicited incriminating statements from him at his home in the absence of counsel. *See Fellers*, 540 U.S. at 524. As the government acknowledges (Br. in Opp. 12), this Court has previously recognized that the "fruit of the poisonous tree" doctrine applies to such Sixth Amendment violations. There is no question, for example, that physical evidence derived from such a violation would have to be suppressed, absent an exception to the derivative-evidence rule or a demonstration by the government of taint attenuation under that rule. *See, e.g., Nix* v. *Williams*, 467 U.S. 431, 442 (1984); *see also United States* v. *Patane*, 124 S. Ct. 2620, 2629 (2004) (again noting that the exclusionary rule in this Sixth Amendment context covers all illegally obtained evidence and "other incriminating evidence *derived from*" the violation) (emphasis added) (quotation omitted). The same would be true of a statement derived from earlier unconstitutional conduct by the police, unless some event had intervened to ensure that the second statement was not the product of the first—a point on which the government would have the burden of proof. *See, e.g., Elstad*, 470 U.S. at 309-310 (Fifth Amendment); *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982) (Fourth Amendment).

The only question here, then, is whether the fact that the police administered *Miranda* warnings between the

first, unconstitutionally-obtained statement and the second statement is sufficient *as a matter of law* to relieve the government of its normal burden of proving attenuation. *Elstad* provides no support for the government's position that it does, for two reasons.

First, *Elstad*'s special admissibility rule is premised particularly on the absence of any constitutional violation. *See, e.g., Elstad*, 470 U.S. at 305. There was no suggestion in *Elstad* that the initial statement was coerced from the defendant. This case, by contrast, involves the fruit of an actual constitutional violation.[1] This Court has never held that

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[1] The government does not dispute here, nor did it dispute below, that this Court based *Elstad* on the absence of an initial constitutional violation. Nor does the government endorse the court of appeals' reasoning that this Court, in *Dickerson* v. *United States*, 530 U.S. 428 (2000), somehow implicitly undermined that express basis for the *Elstad* ruling. Rather, the government seeks to revise the rationale of *Elstad* by intimating (without expressly arguing) that *Elstad* declined to apply the "fruits" doctrine because there was no "completed" Fifth Amendment violation there. The government then draws a putative analogy to the Sixth Amendment, arguing that a "deliberate elicitation" violation is also not complete until trial. *See* Br. in Opp. 10-11. The timing of the so-called "completion" of any constitutional violation was not the basis of *Elstad*, nor has it ever proved relevant to the Court's cases applying the derivative-evidence rule. *See, e.g., Chavez* v. *Martinez*, 538 U.S. 760, 767-770 (2003) (plurality opinion) (holding that violation of Self-Incrimination Clause is not complete until trial, yet reaffirming that regardless whether a coerced statement is admitted at trial, the Constitution requires the exclusion of all evidence derived from that statement); *see also United States* v. *Hubbell*, 530 U.S. 27, 37 (2000).

In any event, the government's argument that the "deliberate elicitation" of an incriminating statement from an indicted defendant is not an actual violation of the Sixth Amendment, unless and until that statement is introduced at trial, is meritless. As the Court made clear in *Henry*, an indicted defendant has a Sixth Amendment right to the assistance of counsel at certain "postindictment confrontations between Government agents and the accused" *precisely because* they are "'critical stages' of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches." 447 U.S. at 269. In other words, such confrontations are part of the "criminal prosecution[]" to which Sixth Amendment guarantees apply—no less than an arraignment or a guilty plea proceeding. When the accused is denied the assistance of counsel at such a "critical

the administration of *Miranda* warnings alone, as a matter of law, is sufficient to obviate the need for a "fruits" inquiry in such circumstances. Indeed, as the government acknowledges (Br. in Opp. 14), *Elstad* itself observed that, if that case had involved an actual violation of Fifth Amendment standards, the traditional "fruits" analysis would have governed, rather than the rule adopted by the Court in that case. *See Elstad*, 470 U.S. at 310 (requiring different analysis when "a prior statement is actually coerced") (quoted also at Br. in Opp. 14). Thus, as the Court has stressed repeatedly, the mere fact that a defendant's statement is obtained after provision of *Miranda* warnings and therefore is presumptively *voluntary* does not, by itself, mean that the statement is not the fruit of an earlier constitutional violation and therefore need not be suppressed. *See, e.g., Kaupp* v. *Texas*, 538 U.S. 626, 633 (2003) (*per curiam*).

Any other rule would provide little deterrence to police violation of constitutional rights—the fundamental purpose of the exclusionary rule—for it would make *Miranda* warnings sufficient, as the government puts it, to "neutralize[]" prior unconstitutional conduct by the police (Br. in Opp. 9). Even without a prior violation of the Sixth Amendment, if the government seeks to admit a deliberately elicited, uncounseled, post-indictment statement against the defendant, it must prove that the defendant was apprised of the nature of his right to counsel and the consequences of waiving it; that he thereafter waived that right; and that he made any statement voluntarily. *See, e.g., Dickerson* v. *United States*, 530 U.S. 428, 434 (2000) (voluntariness); *Patterson* v. *Illinois*, 487 U.S. 285, 292 (1988) (waiver). But, in the government's view, the fact that a prior violation of the Sixth

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stage," a violation of his Sixth Amendment right is complete. The government relies principally on *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), but that case held only that no claim under 42 U.S.C. § 1983 would lie based solely on the fact that an undercover agent had participated in discussions between a defendant and his attorney. The Court did *not* suggest that the Sixth Amendment would have been violated only if the undercover agent had testified at trial. *See id.* at 554.

Amendment *had* occurred makes no difference; the provision of *Miranda* warnings followed by a waiver should still be sufficient to render the statement admissible. In other words, the government suggests that it is entitled to one free Sixth Amendment violation, and if that violation produces something of interest to the police, the violation can be "neutralized" by *Miranda* warnings and the questioning can begin anew. *Elstad* certainly does not stand for such a proposition. *Cf. Missouri* v. *Seibert*, 124 S. Ct. 2601, 2610 (2004) (plurality opinion) (decrying "[t]he object of question-first" effected "to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed").

*Elstad* does not apply here for a second reason: the rationale of the decision is closely tied to the Fifth Amendment principles underlying *Miranda*. The purpose of the *Miranda* requirement is to "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause" of the Fifth Amendment. *Seibert*, 124 S. Ct. at 2608 (plurality) (quoting *Chavez* v. *Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part)). *Elstad* recognizes that, when the police properly secure a voluntary statement, there is ordinarily no reason *in the policy of the Fifth Amendment* to suppress that statement, even though it might have been preceded by an unwarned (yet voluntary) statement. But *Elstad* does not suggest that all voluntary statements secured after *Miranda* warnings are necessarily free from constitutional concern. As the Court recognized previously in this case, police conduct to secure a statement may well violate the Sixth Amendment even if the statement is given voluntarily. *See Fellers*, 540 U.S. at 524; *see also Henry*, 447 U.S. at 273-274.

The purpose of the Sixth Amendment is not so much to prevent police compulsion as to ensure that a person formally charged with a crime has expert legal assistance in navigating the shoals of the criminal justice system. *See, e.g., Maine* v. *Moulton*, 474 U.S. 159, 169 (1985). Given that many defendants may not appreciate that they are entitled

to the assistance of a lawyer in a post-indictment encounter with the police—even if they might understand that they would be entitled to legal assistance at trial—there is a heightened concern that a defendant, having already given one incriminating statement without a lawyer present, would fail to perceive how a lawyer could assist him in a second round of questioning. Accordingly, even if the *Miranda* warnings normally dispel any possible taint of compulsion from the previous elicitation of an unwarned voluntary statement, those warnings are not themselves sufficient as a matter of law to dispel the distinct taint from a Sixth Amendment violation—at least where, as here, little time has passed, the defendant has been held in custody throughout, and the defendant has neither seen a lawyer nor been brought before a magistrate.

*Patterson* v. *Illinois* is not to the contrary. The Court held there that, ordinarily, *Miranda* warnings followed by a valid waiver of rights will suffice to waive a defendant's Sixth Amendment right to the assistance of counsel at a post-indictment police interview. *See* 487 U.S. at 293. But *Patterson* did not hold that a *Miranda* warning eliminates all Sixth Amendment concerns whatsoever. Indeed the Court specifically noted that, "because the Sixth Amendment's protection of the attorney-client relationship—'the right to rely on counsel as a "medium" between [the accused] and the State'—extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." *Id.* at 297 n.9 (internal citation omitted).[2] Nor, of course, did *Patterson* involve any situation in which the provision of *Miranda* warnings had been preceded by a constitutional violation, as is true here.

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[2] As an example, the Court gave the waiver of rights after *Miranda* warnings upheld in *Moran* v. *Burbine*, 475 U.S. 412 (1986); the Court made clear that, "in the Sixth Amendment context, this waiver would not be valid." *Patterson*, 487 U.S. at 296 n.9.

*Miranda* warnings do not purge the taint of a prior Sixth Amendment violation as a matter of law—just as they do not purge the taint of a prior Fourth or Fifth Amendment violation as a matter of law, which this Court has held many times. Rather, the proper question is whether the government has proven, under the traditional "fruits" analysis, that the causal link between the first and second statements was broken. The government has not made this showing.

## II. The Second Statement Was The Fruit Of The First

Having concluded that *Elstad* ousted the traditional "fruits" doctrine in this context, the court of appeals did not resolve this case by applying that doctrine, which requires examining several factors to determine whether evidence was derived from prior unconstitutional conduct. Nevertheless, application of that doctrine would plainly require suppression of petitioner's jailhouse statements. Only one factor supports the statements' admission: the belated administration of *Miranda* warnings. This Court has made indisputably clear, however, that the provision of such warnings, standing alone, is legally insufficient to justify admission of evidence derived from the violation of a defendant's constitutional rights. *See, e.g., Kaupp*, 538 U.S. at 632-633; *Brown* v. *Illinois*, 422 U.S. 590, 604-605 (1975).

As for the other traditional factors, they all point decisively towards suppression of petitioner's second statement. Understandably, the government does not argue that the temporal proximity of the Sixth Amendment violation to petitioner's jailhouse statements favors admission. Rather, the government seeks to minimize the significance of the short passage of time between the two statements (30 minutes) by contending that petitioner was not strictly confined during that period. *See* Br. in Opp. 16. In fact, the officers, after eliciting petitioner's first statements, removed him from his home under arrest, transported him to the jail, and commenced an interrogation. *See* Joint Appendix, *Fellers* v. *United States*, No. 02-6320 (*Fellers* JA), at 21-24, 50-51. When petitioner moved to retrieve his shoes, Deputy Bliemeister followed him, explaining that "you're under arrest.

Wherever you go in the house, I need to go also." *Id.* at 59. This conduct stands in marked contrast to *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), on which the government relies, where officers allowed the defendant to move freely about his house, and even to "put an album on" (*id.* at 108). The brief 30-minute period between petitioner's two statements, during which he was confined throughout, could not "possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691.

The government does not even attempt to argue that there were any meaningful intervening circumstances between the officers' elicitation of incriminating statements at petitioner's home and the later interrogation. As for the flagrancy of the official misconduct in this case, the government does not argue that the officers acted in good faith when they deliberately elicited inculpatory statements from petitioner outside the presence of counsel regarding the charges in the indictment. Nor could the government make such an argument; the rule of *Massiah* v. *United States*, 377 U.S. 201 (1964), prohibiting such tactics, has long been clear, as demonstrated by this Court's unanimous decision in this case. Rather, the government attempts to distract the Court's attention from this factor by focusing on facts irrelevant to the flagrancy of the officers' Sixth Amendment violation. *See* Br. in Opp. 17. Whether the officers carried visible weapons or intended to overpower petitioner's will, while perhaps relevant to the Fifth Amendment, is irrelevant to a determination whether their violation of the Sixth Amendment was flagrant.

Finally, contrary to the government's claim (Br. in Opp. 17-18), the link between petitioner's first and second uncounseled statements is unmistakable. At petitioner's home, the officers elicited admissions on three subjects that they subsequently reviewed (and re-elicited) at the jail: that petitioner previously had been a user of methamphetamine; that he had (during the same period) associated with the persons alleged to have been his co-conspirators; and that he had

(again during the same period) been subject to a number of personal and financial problems. *See Fellers* JA at 18, 20-21, 29-33, 35-36, 47-48, 51-52, 73, 79, 89. The officers then followed textbook policy in exploiting those admissions to obtain a more elaborate confession at the jailhouse. *See* Trial Transcript (Tr.) 91-92, 177. It would have been entirely reasonable for a nonlawyer such as petitioner to have thought that, because he had already admitted to the police that he was both a methamphetamine user and an associate of the alleged co-conspirators during the time of the alleged conspiracy, it was incumbent upon him to respond to the officers' jailhouse questions asking for additional details. A lawyer, of course, could have advised petitioner that the initial statement could be suppressed and that it might well be better to remain silent. The government in this case exploited its advantage over an uncounseled defendant lacking legal knowledge and skill. That is exactly what the Sixth Amendment is intended to prevent.

## III. THE COURT OF APPEALS' HARMLESS-ERROR HOLDING CONTRAVENES WELL-ESTABLISHED PRECEDENT OF THIS COURT

The government concedes that the court of appeals articulated a standard flatly inconsistent with the constitutional harmless-error standard, but attempts to minimize the error by asserting that the lower court made only "passing" references to its improper standard. *See* Br. in Opp. 21-22. The assertion does not withstand scrutiny. The court of appeals relied squarely on its erroneous evidence-sufficiency standard to reject petitioner's central harmless-error argument—that the government used his jailhouse statements to shore up the credibility-challenged testimony of its own witnesses. The importance of the court of appeals' sufficiency-of-the-evidence finding is plain from the opinion's concluding words on the harmless-error subject:

> [T]he evidence presented by the government in this case is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute. Accordingly, any error in admitting [petitioner's] jailhouse statements was harmless.

Pet. App. 14a. Similarly, instead of asking whether the government's use of petitioner's jailhouse statements for their corroborative effect contributed to petitioner's verdict, the court of appeals abdicated its harmless-error responsibility and concluded simply that those witnesses' "credibility was for the jury to decide." *Id.* at 13a. The court of appeals' errors were not idle passing references.

Had the court of appeals employed the correct standard, it could not have found harmless error. The government disagrees, claiming that its witnesses already corroborated one another. *See* Br. in Opp. 19-20. It is telling, though, that the government can only identify three narrow circumstances in which its seven cooperating witnesses did so. Among those examples, one witness did not implicate petitioner and the other two contradicted one another on the supposed sequence of events in the first example (Tr. 197-202, 316-322, 382-389); the witnesses contradicted each other on the total quantity of methamphetamine purchased in the second example (Tr. 250-253, 556); and the witnesses in the third example contradicted one another on the only potentially incriminating aspect of the event (Tr. 241-242, 286-288, 497-506). None of this testimony involved petitioner's distribution of methamphetamine and no incriminating testimony was corroborated by phone records or address books.

Most importantly, the government itself relied on petitioner's statements in its closing arguments to address the credibility problems with its own case (Tr. 704, 732-734), yet the jury still discredited that case, returning only a verdict on a lesser-included charge (Tr. 739). In these circumstances, and where the erroneously admitted evidence is the petitioner's own confession—"probably the most probative and damaging evidence that can be admitted," *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) (quotation omitted)—the admission of petitioner's jailhouse statements could not have been harmless.

## CONCLUSION

For the foregoing reasons, as well as those in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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